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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

GAS UTILITIES COMPANY OF ALABAMA, INC.,
Petitioner,
v.
SOUTHERN NATURAL GAS COMPANY AND
ALABAMA GAS CORPORATION,
Respondents.

**Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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132 pp

QUESTIONS PRESENTED

1. Does a potential competitor that has been foreclosed from a market by anti-competitive behavior have to show that he actually performed under a contract to provide services in that market and does he have to sign a promissory note to show ability to secure financing in order to have standing to assert a cause of action under §1 of the Sherman Act?

2. When the evidence shows a series of agreements between the defendants which by their very nature are anti-competitive, and defendants enter into a settlement agreement which penalizes one financially if it attempts to supply a competitor of the other, and one of the defendants adopts a policy of refusal to deal in direct response to the other's request, is this sufficient evidence of a contract, combination or conspiracy in restraint of trade under § 1 of the Sherman Act?

LIST OF PARTIES

The parties to the proceedings below include the petitioner, Gas Utilities Company of Alabama, Inc. and the respondents, Southern National Gas Company and Alabama Gas Corporation.

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3. When the evidence shows a series of agreements between the defendants which by their very nature are anti-competitive, and defendants enter into a settlement agreement which penalizes one financially if it attempts to supply a competitor of the other, and one of the defendants adopts a policy of refusal to deal in direct response to the other's request, is this sufficient evidence of a contract, combination or conspiracy in restraint of trade under § 1 of the Sherman Act? i

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gas Utilities Company of Alabama, Inc., (GUA), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on July 27, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 996 F.2d 282 and is reprinted in the appendix at "B."

The memorandum and order of the United States District Court for the Northern District of Alabama, Southern Division, is as yet unpublished and is reprinted in the appendix "A."

JURISDICTION

On August 12, 1992, the District Court granted summary judgment against petitioner, Gas Utilities Company of Alabama, Inc. (See appendix "A.") On petitioner's appeal to the Court of Appeals for the Eleventh Circuit, the order of the District Court was affirmed on July 27, 1993. (See appendix "B.") The Eleventh Circuit had jurisdiction under 28 U.S.C. §1291.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Introduction of the Parties

Gas Utilities Company of Alabama, Inc. (GUA) incorporated in 1989 for the purpose of selling natural gas and transporting natural gas to industrial and other large end users in northern Alabama. (1SR-160C-3). Dan Tutcher, one of the principal shareholders in GUA, was very experienced in selling natural gas, constructing gas pipelines, and providing gas transportation services to industrial customers throughout the midwest and southwestern United States. (1SR-160C-1-2). Southern Natural Gas Company (Southern) operates an interstate pipeline and sells and transports natural gas directly to a select few industrial end users and to local distribution companies such as Alabama Gas Corporation (Alagasco). Southern's pipeline originates in Louisiana and terminates in New York. Alagasco is a local distribution company which sells and transports natural gas to industrial, commercial, and residential customers in north central Alabama. Southern has the capacity and, in fact, does directly connect and transport natural gas to certain industrial end users including U. S. Steel in Birmingham,

Brikerstaff Clay in Phoenix City, Gulf States
Steel in Annaston, and Goodyear Tire & Rubber in Gadsden. (Depo. Mike Warren, volume 1, pp. 90-95).

B. Southern and Alagasco are Potential Competitors

Alagasco and Southern share a few industrial accounts which include U.S. Steel at Birmingham, Brikerstaff Clay Products in Phoenix City, Goodyear Tire & Rubber in Gadsden and Gulf States Steel. (Warren depo. pp. 90-95). Alagasco considers Southern as its largest potential competitor. (2 Warren depo. pp. 13-21). (deposition Exhibit "1")

Alagasco connects all the remaining industrial end users in the state of Alabama in the geographic area where it does business. (Warren depo. pp 90-96); Wiseman depo pp. 196-197). All industrial end users in Alagasco's trade area or market area can only be serviced from Southern's interstate pipeline. (Wiseman depo. pp. 196-197). While Alagasco can and does purchase some gas from another interstate pipeline, Transco, none of the industrial accounts in the area serviced by Alagasco can be economically or reasonably serviced from the Transco line. (Wiseman depo. pp. 196-197).

C. GUA Recognizes Competitive Opportunity to Enter the Market

The competitive situation, or rather the lack of competition in north central Alabama for gas transportation services, presents an excellent opportunity for new entrants in the market. (1SR-160C-2). The initial marketing surveys and research conducted by GUA determined that an excellent

opportunity existed to bypass[1] Alagasco due to extremely high prices charged by Alagasco to its industrial end users which could also be geographically, economically and reasonably serviced directly from Southern's interstate or intrastate pipeline system. (1SR-160C-2). The prices charged by Alagasco in 1989 and 1990 were very high on a relative basis when compared to other transportation fees charged to industrial customers by other distribution companies nationally. (1SR-160C-2). Given the high prices charged by Alagasco, an opportunity existed to directly connect the industrial customers to Southern's pipeline, thereby bypassing Alagasco. (1SR-160C-2).

D. GUA Was Financially Prepared to Enter the Market

GUA received a financing commitment from Texline, Inc. and its principals, Kenneth Holmes and Stephen Herbst, to finance any projects that Dan Tutcher brought to them from Alabama. (1SR-160C-5-6). Texline, Holmes, and Herbst never refused to finance any project that Mr. Tutcher brought to them before, during, or since this time period. (15E-160C-6). Mr. Tutcher had specific discussions with both Mr. Holmes and Mr. Herbst in which they discussed the general parameters of the financing needs of Gurney Industries. (1SR-160C-6). Mr. Holmes and Mr. Herbst agreed to finance the projects based on the projections made by GUA. (1SR-160C-6). Texline had committed to Mr. Tutcher that they were ready, willing and able to finance this project and any other project in Alabama which met its investment criteria. (1SR-160C-6).

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[1] "Bypass" refers to the construction of a pipeline to connect an industrial customer directly to an interstate pipeline without using the pipeline facilities of the industrial customer's local gas distribution company. (Major depo. at 160.)

Moreover, Mr. Tutcher at the time had a net worth of in excess of $1,000,000.00. (1SR-160C-6). Even if Texline did not follow through with its commitment to finance the projects as they had always done in the past four years, Mr. Tutcher would have personally financed the Gurney Industries pipeline and the Tuscaloosa Steel pipeline. (1SR-160C-6). Mr. Tutcher was ready, willing and able to do so. (1SR-160C-6). GUA demonstrated the requisite financial preparedness to enter the market. Financing was not an issue.

E. GUA Undertook Extensive Preparatory Work to Enter the Market

GUA conducted a market survey to identify the potential customers of GUA. (1SR-160C-2-3). GUA contacted approximately 40 customers in order to survey the market. (1SR-160C-3). Mr. Tutcher and Mr. Levrier, an employee of GUA, targeted the customers with optimum geographic and volume requirements for immediate connection. (1SR-160C-2). GUA intended to solicit all industrial accounts in Alabama, however, based on their survey a specific set of accounts were targeted in the Birmingham, Prattville, and Tuscaloosa areas for initial solicitation. (1SR-160C-2-3). The results of their market survey in the Alabama area was reduced to writing. (1SR-160C-2-3). GUA consummated contracts with both Gurney and Tuscaloosa Steel. (See Appendix "C.")

F. GUA Consummates Gas Purchase and Sales Agreements With End Users

The next step in reasonably entering the pipeline business is to obtain a customer. (1SR-160C-3). GUA solicited gas transportation contracts with two customers, Gurney Industries in Prattville and Tuscaloosa Steel in

Tuscaloosa to supply gas. GUA obtained and "consummated" the contracts with Gurney and Tuscaloosa Steel (Appendix "C"). GUA was reasonably certain of obtaining many other customers in the Birmingham, Tuscaloosa, and Prattville areas. (1SR-160C-3-4).

G. GUA Contacted the Alabama Public Service Commission Regarding Regulation

GUA consulted several times with the Alabama Public Service Commission to determine whether its direct connections to the industrial customers were permitted under the Public Service Regulatory Scheme. (1SR-160C-4-F).

Dan Tucker and Ray Levrier physically viewed a number of potential customers sites including Gurney Industries and Tuscaloosa Steel to determine the logical, reasonable, and economic interconnect point with the interstate or intrastate pipeline and to determine the most economical and reasonable routing for the laying of the pipeline. (1SR-160C-4).

GUA consulted with the Alabama Public Service Commission regarding the issue of eminent domain and its availability to GUA as well as the use of public right-of-ways. GUA determined there was no impediment in Alabama whatsoever. (1SR-160C-4)

H. GUA Investigated the Costs and Feasibility of Pipeline Connections

GUA consulted with Unitec, a right-of-way, routing, and survey company in Jackson, Mississippi. (1SR-160C-5). Based on GUA's consultations with the Alabama Public Service Commission, Unitec, and our physical surveys of the sites, GUA determined that there were no abnormal or unusual problems in the procurement of either private right-of-way or government permitting. (1SR-160C-5). GUA also

determined that there was no unusual right-of-way conditions in the Prattville and Tuscaloosa areas which would cause any unusually high costs in laying the pipe. Additionally, GUA contacted two construction companies in the central Alabama area to do lay cost analysis. In consulting with the construction companies GUA determined that the lay costs were similar to operations in which Mr. Tutcher has been involved in Texas and other areas in the past. (1SR-160C-5).

I. GUA Prepared Projections to Determine the Profitability of Entry Into the Gas Distribution Market

GUA prepared financial pro formas[2] and projections to determine the economic viability of servicing Gurney Industries, Tuscaloosa Steel and other potential customers that it was reasonably certain of obtaining. (1SR-160C-5; Depo. Ex. 120; 136). The financial projections and pro formas prepared by or for GUA were based upon the data collected by GUA. (1SR-160C-5).

J. Southern Refuses to Give a Tap to GUA

The next step to enter the market is to obtain a delivery point or tap from the interstate or intrastate pipeline facility to provide transportation to the end user. (1SR-160C-3). On November 16, 1989, GUA requested a tap from Southern in the Tuscaloosa area to service Tuscaloosa

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[2] Contrary to the trial court's finding that the financial pro formas were not in evidence, the financial projections and pro formas prepared by or for GUA are attached to the affidavit of Dan Tutcher as Exhibits No. 120 and 136 and were part of Appellant's summary judgment evidence. Additionally, the financial pro formas were part of the record on appeal as Exhibits 120, 136, and 1SR-160C.

Steel and other potential clients. (1SR-160C-3; Depo. Ex. 115).[3] Southern refused to grant the tap to Gas Utilities. (1SR-160C-3).

On December 14, 1989, GUA applied to Southern for a tap on its interstate pipeline to permit direct connections in the Prattville area to service Gurney Industries and other customers which Gas Utilities was reasonably certain of obtaining in that area. (1SR-160C-3; Depo. Ex. 116). Once again, Southern declined to give GUA the tap. (1SR-160C-3).

GUA was ready, willing, able and contractually obligated to provide gas transportation to Gurney Industries and Tuscaloosa Steel. (1SR-160C-4). The only impediment to GUA being able to fulfill its contracts was Southern's refusal to provide a tap. (1SR-160C-4).

K. Southern's Refusal to Provide GUA Access Was Without Legitimate Business Purpose

Southern has failed to show economically sound business reasons for not dealing with Gas Utilities. When Gas Utilities attempted to get a tap from Southern to service Tuscaloosa Steel Company, Southern denied the tap under its alleged bypass policy. Tuscaloosa Steel was a customer of Alagasco. However, the gas Alagasco transported to Tuscaloosa Steel was from the Coronado line shipped through Alagasco's line. The gas never was transported through Southern's line. Nevertheless, Southern denied the

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[3] "Depo. Ex." as used in this brief refers to deposition exhibits in five bound volumes filed by plaintiff concurrently with Plaintiff's Response to Defendants' Motions For Summary Judgment. Vol. I of V - Exhibits 1-50; Vol. II of V - Exhibits 51-79; Vol. III of V - Exhibits 80-120; Exhibits IV of V - Exhibits 121-173; Vol. V of V - Exhibits 174-197. The exhibits were all part of the record of petitioner's appeal to the Eleventh Circuit Court of Appeals.

tap to Gas Utilities because in part, it did not provide Southern with "incremental volume." (1SR-160C-3-4). Any amount of volume provided to Tuscaloosa Steel as an end user would have been additional gas for Southern. (Tutcher depo. at 533-534).

Southern's refusal to deal with Gas Utilities is not consistent with its independent interest. The only thing consistent about the policy is that no competitor or potential competitor of Alagasco ever gets a tap. If Southern provided GUA with reasonable access to its essential gas transportation facilities, GUA's competition would have resulted in lower gas prices to end users with elastic demands and in turn, have served to increase throughput and gas transportation revenues on Southern's interstate gas pipeline system. (R4-148-10). The only explanation for Southern's self-imposed action contrary to Southern's legitimate self-interest was Respondents' desire to block GUA's entry into the relevant market. (R4-148-10). Southern has given conflicting reasons for refusing to give GUA a tap. Initially, Southern said it would not grant a tap to GUA unless there was incremental economic benefit for Southern to do so or there is a business justification for Southern to do so. (1SR-160C-4; Depo. Ex. 81). (1SR-160C-4). Southern never did not tell GUA that Southern had any take-or-pay exposure to Alagasco if it directed Alagasco's customers to Southern. (1SR-160C-4). Had Southern advised GUA of the take-or-pay exposure, GUA would have paid Southern that amount in order to get a tap. (1SR-160C-4).

After suit was filed, some Southern witnesses claimed that Southern's justification for refusing to deal with GUA was based upon some far-fetched notion they called the "death spiral theory." (Depo. William Major pp. 93-95, 145-151, 161-166; depo. Rex Lysinger pp. 235-238; depo. Bill Mathews pp. 72-74, 76; depo. Mark Limbaugh pp. 38-41). Once this unique theory came to light, it was repudiated by Southern's lawyers in open court. (R2-96-10). The

District Court questioned whether any rational man on the street would buy into that argument. (R2-96-10). No matter what the excuse for its refusal to deal with GUA, the result was always the same. That is, GUA was denied a tap to connect to Southern's interstate pipeline. Southern's explanations do not square with economics and in themselves raise a fact question.

L. Agreement Between Alagasco & Southern About Direct Connection

In 1985, Alagasco applied for a tap at Transco in south central Alabama. (2 Warren 15-16. In effect, this was Alagasco's bypass of Southern. This was the first time that Alagasco ever attempted to get a tap from Transco and the taps they sought were in the Montgomery and Selma areas. In response to Alagasco's application, Southern filed an intervention to the proceedings before the Alabama Public Service Commission in which it sought to prevent the Certificate of Public Need and Necessity to be issued to Alagasco to prevent Alagasco from getting a tap from Transco. (1SR-160D). (Wm. Major depo. at 74-80; Warren depo. 84-87; 2 M. Warren 15-22; Lysinger depo. 186-195).

In retaliation to Alagasco's request for a tap, Southern began soliciting Alagasco's industrial customers in the Tuscaloosa area. Alagasco responded by filing a complaint against Southern before the Alabama Public Service Commission alleging that Southern should be subject to the jurisdiction of the Alabama Public Service Commission if it were soliciting customers for direct connection. According to Mike Warren, if Southern was going to act like a public utility, then he was going to introduce them to the pleasures of being regulated by the Alabama Public Service Commission. (2 Warren 22-25).

Both of these complaints before the Alabama Public Service Commission were dismissed by mutual agreement.

(2 Warren depo 23-27). (Major depo. 84-85).

Since that time, Southern has never solicited another direct connection in the Alabama area and has not attempted to compete with Alagasco for industrial accounts since the agreement. (2 Warren 25-28). Moreover, Alagasco has never sought another tap from Transco. (Wiseman depo. p. 56). Since the agreement to mutually dismiss the litigation in the public service commission, Alagasco has never sought or obtained another tap from Transco and Southern has never sought to directly connect any customers. (Wiseman depo. 56; Warren depo. 24-28).

M. Alagasco's Policy Not To Compete

Joe Hawkins is the director of industrial and commercial marketing for Alagasco. He testified that it was a matter of policy from upper management that Alagasco would not solicit any industrial accounts which were already being served by an existing pipeline company. (J. Hawkins depo. 31-37). Hawkins testified this was a matter of policy in effect the last four or five years. (J. Hawkins depo. 31-37). This is additional circumstantial evidence of an agreement not to compete since rational business behavior would be to solicit one's competitor's business.

N. Southern's Bypass Analysis

Southern prepared an analysis of bypass potential in 1987. It concluded that Southern's bypass of Alagasco would be beneficial to Southern and the end users. Southern never attempted to bypass despite these recommendations. (Depo. Ex. 72).

O. The Take or Pay Negotiations

Beginning in 1987 or 1988, Southern began extensive negotiations with its major customers regarding its take or pay exposure. (Warren depo. 116, 226). The customers included Atlanta Gas Light, Alagasco and South Carolina Natural Gas and many other municipalities. The meetings occurred primarily in Atlanta but some occurred in Birmingham, Washington, and other places. The executives from Southern and Alagasco were always present. At the take or pay meetings, Alagasco and Atlanta Gas Light both raised questions regarding bypass and direct connection. In response to the issue of bypass, Southern agreed in the take or pay settlement that if it directly connected a customer of Alagasco, that Southern would forfeit a portion of the take or pay settlement due it attributable to that customer that it directly connected. (See Warren depo. 95; Affidavit of J. Wilson).

P. Southern's First Bypass Policy

Southern's bypass policy was announced in late 1988 or early 1989. One of the first applicants under the policy was GUA. GUA first applied for a tap in November of 1989 and again in December of 1989.

The policy was never committed to writing. The principal architect of the policy was William Major, general counsel for Southern, although William Matthews, the president, and Ron Gardner had a substantial input. William Major's account of the policy differs from William Matthews and Ron Gardner's account of the policy. Major said that Southern's bypass policy was not to grant a direct connection unless (1) there was incremental volume from the direct connection, (2) the direct connection could not be served by existing taps , and (3) that it was otherwise in the best interests of Southern to do so. (Major depo. 111-112).

Matthews and Gardner both testified that Southern's bypass policy was to grant no tap if the customer could be served by an existing tap, and it was not otherwise in the best business interests of Southern to do so. Matthews and Gardner have omitted the incremental volume element from their recollection of the policy. Incremental volume becomes relevant and extremely important when dealing with Gas Utilities and Tuscaloosa Steel. An entirely different version of the policy was given orally to Dan Tutcher (1SR-160C-3-4).

Q. Southern's Phantom Policy

At the time that Gas Utilities was denied its tap there was never any written reason given Gas Utilities or even a statement to the effect that there was a policy. Indeed, if there was in fact a policy it was never fully understood by anyone. In truth, there was not a policy but an amorphous, undefined excuse for never granting a tap since it was never put in writing and it was never given in writing to Dan Tutcher. Dan Tutcher wrote a letter to Mark Limbaugh at Southern reciting word for word what Mark Limbaugh told him to be the reasons why Gas Utilities was not granted a tap. (1SR-160C-3-4;) (Depo. Ex. 81.) However, Mark Limbaugh denied that this is what he told Dan Tutcher. (Limbaugh depo. at 270 and 271). In essence therefore, we have three different versions of the same policy. The only thing consistent about the three policies is no taps were ever given.

R. Alagasco Fails To Seek Alternative Gas From Other Interstate Pipelines

75% to 80% of the natural gas sold or transported by Alagasco is either purchased or transported through Southern's lines. Roughly 20% is obtained from Transco.

(Wiseman depo. 60). Alagasco's volume from Transco has been constant since 1985 or 1986. (Wiseman depo. 60). Coincidentally, Southern's volume has been constant since Alagasco got the tap from Transco in 1985 or 1986. Alabama local production accounts for only 5%-10% of the gas used by Alagasco to be either sold or transported. (Wiseman depo. 74). When Don Wiseman was asked why he did not acquire local gas, for Alagasco, his reply was "I have got the supply portfolio I want. I don't need anymore. I am not concerned with it." (Wiseman depo. pp. 118-119). Once again, rational behavior would be to obtain a local supply and to exploit that to the fullest extent unless there is some sort of agreement for *quid pro quo* to Southern. (See J. Wilson Affidavit and Table attached).

SUMMARY OF ARGUMENT

GUA did everything that could reasonably and practicably be done to enter the gas transportation business in Alabama. GUA surveyed the market, performed cost and expense analyses, conferred with regulatory authorities, and did preliminary surveys of construction right-of-ways and costs. It obtained two customers and entered into two contracts to transport gas. Notwithstanding the trial court's misapprehension of the evidence, the contracts were "consummated" and binding. The only remaining step was to obtain a tap from Southern.

The trial court impermissibly weighed these facts and concluded as a factual matter that there was not adequate preparedness to enter the market. The trial court would require new market entrants to put the cart in front of the horse. By the trial court's reasoning, GUA would have had to have taken all those steps and additionally, sign a promissory note, build a pipeline to Southern's pipeline and then demand a tap before it had demonstrated ample preparedness to enter the market. This is unrealistic and ignores the realities of how the pipeline business is conducted. Additionally, the trial court would require wasteful and unreasonable activities for which there is no purpose. The steps one takes to attempt to enter a market should be weighed by a jury to determine whether there was adequate preparedness. *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559 (11th Cir. 1987).

There is compelling circumstantial evidence of a contract, combination or conspiracy in restraint of trade. Alagasco had attempted to bypass Southern in 1985. When Southern learned of that attempt, it began soliciting the industrial accounts of Alagasco. Both parties contested the other's actions before the Alabama Public Service Commission. Alagasco and Southern mutually dismissed their litigation. After that dismissal in 1985, Alagasco never

attempted to bypass Southern again by going to one of Southern's competitors. Moreover, Southern never attempted to solicit any industrial accounts of Alagasco. No one else has been permitted by Southern to bypass Alagasco. Later, Alagasco and Southern entered into a take-or-pay settlement in 1988 which provided that Southern would be penalized if it ever bypassed Alagasco. As a consequence of this agreement, Southern had an economic disincentive to connect any industrial accounts or any competitor of Alagasco who would bypass Alagasco. Also, Southern's only written bypass was adopted as a result of a direct inquiry of Alagasco. Because of the parties' conduct, no new entrants to the gas transportation market are possible in Alabama. Southern does not bypass Alagasco's customers nor will it permit any new entity to do so. Alagasco for its part has never again tried to bypass Southern by seeking new interstate supply.

ARGUMENT

A. GUA Was Ready, Willing And Able to Enter The Market Except for Southern's Wrongful Refusal to Deal .

The Eleventh Circuit has recognized that an intent to enter a market coupled with a showing of preparedness is sufficient to establish an injury in fact. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991), *pet. for cert. filed*, 60 U.S.L.W. 3522 (1992) (citing *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir)., *cert. denied*, 385 U.S. 991; 87 S.Ct. 600; 17 L.Ed.2d 451 (1966). As stated by the court in *Thompson*: "As long as [a] plaintiff [has] made a reasonable attempt to enter a market, our Circuit's case law recognizes that [a] plaintiff has standing to contest antitrust violations which create barriers to that market." *Thompson*, 934 F.2d at 1572.

The courts have looked at several factors in assessing the preparedness of a firm to enter into the marketplace, that is, as an element of causation of injury and standing. These factors have included:

> the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment; the consummation of contracts by the plaintiff; affirmative action by plaintiff to enter the business; and the background and experience of plaintiff in the prospective business.

Jayco Systems, Inc. v. Savin Business Machines Corp., 777 F.2d 306 (5th Cir. 1985), *cert. denied*, 479 U.S. 816; 107 S.Ct.. 73; 93 L.Ed.2d (1986) (quoting *Martin v.*

Phillips Petroleum Co., 365 F.2d 629, 633 (5th Cir)., *cert. denied*, 385 U.S. 991 (1966).

In order to recover for an antitrust injury that arises from a frustrated attempt to enter a new market, two significant requirements must be established in order to initially prove a plaintiff's entitlement to recover. There must be a demonstration of "(1) an intention to enter the business, and (2) a showing of preparedness to enter the business." *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987).

Yet, what the trial court required was much more. It held that mere proof of ability of financing was not enough, but that a plaintiff must have some sort of commitment or documentation beyond mere ability. Indeed, both the trial court and the Eleventh Circuit ignored Mr. Tutcher's uncontradicted testimony of not only his own ability to finance the projects himself, but his absolute willingness and commitment to do so.

Curiously, the Eleventh Circuit held for the first time that in order to show preparedness to enter the market, a plaintiff must show the court it had *secured* financing as opposed to the ability to secure financing. 996 F.2d at 283. This has never been the law, and imposes an inappropriate and unreasonable burden on most plaintiffs. What happens if no financing is necessary to enter a market? More to the point, this holding ignores the *fact* that Mr. Tutcher was ready, willing and able to invest any necessary capital to construct the pipelines from his own resources.

The evidence in this case clearly supports both the intent of Petitioner to enter into the gas distribution market in Alabama and the preparedness required to support its complaint of injury in fact. Intent and preparedness to enter the market is evidenced by:

1. extensive preparatory work undertaken by GUA, including market surveys; (Tucher Affidavit);

2. communications with the Alabama Public Service Commission, regarding regulation, industrial end users and pipeline connection facilities, and eminent domain rights; (Tutcher Affidavit);

3. an advertising campaign and brochure prepared and sent to potential industrial gas end users in the Alabama market area, (depo. Exhibit "113"):

4. the securing of contracts with Gurney Industries and Tuscaloosa Steel; (Appendix "C").

5. solicitation of other potential industrial end users, and the preparation of pro formas of significant industrial end users, including Tuscaloosa Steel, Phifer Wire, and Gurney Bros., respectively. (Depo Exhibits 120 and 136) (Tutcher Affidavit):

6. GUA's inquiries and investigations into costs and feasibility of pipeline connections. (Tutcher Affidavit):

7. GUA inquiries and investigations into costs and feasibility of pipeline connections. (Tutcher Affidavit):

8. financing commitments secured by GUA from Steven Herbst and Kenneth Holmes of Tex. Line (See Depositions of Herbst depo. 52-53; Holmes depo. 44-45; Tutcher depo. 436, 441, 534-434; and Tutcher Affidavit):

9. purchase and sale agreements with Tuscaloosa Steel Corp., and Gurney Industries, Inc.; (Depo. Exhibits 126 and 122):

10. maps and geographic surveys made at the request of GUA of existing gas pipelines; (Tutcher depo. 539-540);

11. inquiries regarding the necessity of GUA's regulation by FERC and the concomitant administrative requirements of gas distributors under FERC; (Tutcher depo. 503-505):

12. inquiries made regarding rights of eminent domain; (Tutcher Affidavit): and

13. projections to determine the profitability of entry into the gas distribution market; (Tutcher Affidavit).

GUA has satisfied the requisite level of preparedness to support its standing as an antitrust plaintiff. Although GUA did not have unlimited assets of its own, it did indeed secure third-party financing commitments including from Dan Tutcher. (Herbst depo. 52-55: Holmes depo 44-45; Tutcher depo. 436, 441, 534-535). Southern has persuaded the lower Courts to rewrite case law by arguing that all financing commitments must appear in writing. However, question of financing goes to the weight and not sufficiency of evidence.

Perhaps the most perplexing holding by the trial court and the Eleventh Circuit is that GUA failed to "*consummate*" its contracts with its customers. 996 F.2d 283. It is true that no gas flowed to Gurney or Tuscaloosa Steel, but it was not for want for "consummation" of contract on the part of

GUA, but because Southern refused to deal.

The contracts are attached to the Appendix "C." They contain all essential terms and are fully enforceable and were executed by GUA and its customers. To the extent possible, they were consummated. There was not contractual performance because of Southern's and Alagasco's illegal contrivance. It would be an absurdity to hold that since the contracts were not performed because of the defendants' conduct, plaintiff has not made a showing of standing to assert antitrust violations for defendants' conduct. Yet this is precisely what the trial court did with the Eleventh Circuit's approval. This is not justice, but a mockery of justice.

Nor can Southern claim that GUA lacked preparedness to enter the relevant market "as it had never laid an inch of pipe." (See Motion for summary Judgment, p. 10). The first comprehensive steps evidencing its intent to enter the market was GUA's request for taps. (Exhibit"E"). Upon Sonat's blanket refusal and denial of these requests, any further attempts to lay pipe would have been futile. (See, Tutcher Affidavit). Southern's position serve only to victimize the victim.

Indeed the realities of the business and the marketplace seem to get lost in the legal reasoning. GUA did all that it could reasonably and practically have done to fulfill its gas contracts with Gurney and Tuscaloosa Steel. Acquiring right of way, and building a pipeline from Gurney to the pipeline of Southern without first getting a tap from Southern would not only have been improvident and wasteful, but GUA would have more likely been condemned by the courts because of its foolishness. It would truly be putting the cart before the horse.

The respondents' refusal to grant pipeline access to GUA, in furtherance of respondents' anticompetitive agreement, and GUA's preclusion as a viable competitor from the gas distribution market evidences "a [direct] causal relationship between the antitrust violation [agreement and

conduct of Southern and Alagasco to restrain/foreclose market competition] and the injury [sustained]" by GUA. *National Independent Theater Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602, 607 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056; 105 S.Ct. 2120; 85 L.Ed.2d 484 (1985); *Austin v. Blue Cross*, 903 F2d 1385 (11th Cir. 1990).

B. Ample Evidence Was Offered Of An Agreement To Exclude Competitors and Potential Competitors

1. The Standard of Proof

To prove that an agreement exists between Southern and Alagasco, GUA must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781 (1946). Most conspiracies are proved by inferences drawn from the behavior of the alleged conspirators. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991).

This Court recently held that *Matsushita Electric Industrial Co. v. Zenith*, 475 U.S. 574 (1986), demands only that the non-moving parties inferences be reasonable in order to reach the jury. *Eastman Kodak Co. V. Image Technical Services, Inc.*, 504 U.S. ___, 119, L.Ed. 2d 265, 285 (1992). The requirements of *Matshshita* that the Plaintiff's claims make economic sense did not introduce a special burden on Plaintiffs facing summary judgment in antitrust cases. *Kodak*, 119 L.Ed 2d at 285.

Section 1 of the Sherman Antitrust Act provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The terms "contract, combination . . . or conspiracy" are used

interchangeably to describe the requisite agreement between two or more persons to restrain trade. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991).

Gas Utilities must present evidence that reasonably "tends to exclude the possibility" that the alleged co-conspirators acted independently. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 72 (1984). This means that "conduct as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of anti-trust conspiracy." *Matsushita Elec. Indus. co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

Thus, the issue is whether a reasonable trier of fact might conclude from the evidence that Southern and Alagasco were parties to an agreement or conspiracy to restrain trade. Compelling evidence exists in the record to give rise to a reasonable and fair inference of a collusive agreement between Southern and Alagasco to exclude competition and control pricing. Certainly, ample evidence was presented which establishes a genuine issue of material fact as to whether there was "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. V. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

GUA needs to show that the agreement or conspiracy alleged is an economically reasonable one that would inure to the defendants' economic benefit. *Bolt v. Hallifax Hosp. Medical Center*, 891 F.2d 810 (11th Cir. 1990); *Instructional systems development corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir. 1987) (summary judgment not appropriate under *Matsushita* when defendants "could reasonably have been economically motivated"). Secondly, GUA needs to offer evidence that tends to exclude the possibility that the alleged co-conspirators acted independently and in a manner consistent with rational business objectives. *Monsanto Co. V. Spray-Rite Service Corp.*, 465 U.S. 72 (1984). GUA has done both. GUA is

not required to prove an intent on the part of Southern and Alagasco to restrain trade or to build a monopoly. *United States v. Griffith*, 334 U.S.100 105 (1948). So long as the purported conspiracy has an anti-competitive effect, GUA has made out a case under § 1 of the Sherman Act. See *NCAA v. Board of Regents*, 468 U.s. 85, § 101n. 23 (1984).

2. A Contract, Combination or Conspiracy Between Southern and Alagasco is Not Only Economically Feasible, but Plausible

The lower courts erred because the existence of an agreement or conspiracy between Southern and Alagasco was shown to be not only economically rational but practically feasible and quite plausible. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

In *Matsushita,* the alleged conspiracy was deemed economically irrational because it was alleged that conspirators agreed to sustain the lost income for a period of over 20 years in the hope of thereafter reaping monopoly profits. The Court found that such a conspiracy is an economically infeasible one. By contrast, in this case, the respondents' agreement or conspiracy of respondents is a perfectly feasible and sensible undertaking to exclude GUA and other competitors from the business of delivery of natural gas in the relevant market. Indeed, throughout the record Southern and Alagasco pejoratively refer to GUA as a "cherry picker" or "cream skimmer." Southern and Alagasco excluded competition and engaged in concerted action to accomplish the purpose of their pact including Southern's refusal to deal with GUA. They had no incentive to foster competition. The actions of Alagasco and Southern served to effectively block competition and preserve the respective respondents' monopoly in the transmission and delivery of natural gas. The respondents' refusal to deal prohibited GUA's entry into the market and served to

maintain excess prices for the acquisition and delivery of natural gas to large end users in Alabama. But for the respondents' suppression of competition, the entry by GUA into the relevant market would have resulted in lower end user gas prices and increases in total gas consumption and gas demand. (R4-148-13).

By exerting complete control over the transmission, acquisition and delivery of natural gas, Southern and Alagasco reaped monopoly profits arising from a collusively inflated market price. Moreover, if unity is maintained, no competitor can enter the market and offer a more competitive pricing arrangement because Southern has a monopoly over the essential gas transmission facilities required to transport natural gas to large end users in the relevant market in Alabama. (R4-148-9). Respondent Alagasco has operated and continues to operate the only gas delivery system to nearly all large end users in the relevant market. Southern and Alagasco have arrived at a mutual agreement not to compete for the delivery of gas to the large end users being served by Alagasco. Thus, the conspiracy between Southern and Alagasco is not only economically rational but practically feasible and attractive to the respondents. *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1430 (11th Cir. 1987).

3. Evidence That Southern and Alagasco Did Not Act Independently

Following the 1985 settlement of their regulatory disputes, Southern never again attempted to solicit Alagasco's large industrial clients and Alagasco never again attempted to bypass Southern as its principal supplier. Is this merely coincidental or is it evidence albeit circumstantial of an agreement to refrain from competition? Certainly the result is a lack of meaningful competition. Indeed, since then it became Alagasco's express corporate policy not to solicit an

industrial customer already being serviced by another pipeline company.

The respondents have deprived GUA of the opportunity to compete for customers by entering into pre-existing illegal anticompetitive agreements to deny access to any "new" or potential gas distributors within the geographic market areas serviced by Alagasco. This agreement's anticompetitive nature received unfavorable comment by the Federal Energy Regulatory Commission (FERC) in its Order, reported at *46 FERC § 61,336.* (Stalon, Commissioner, dissenting. "This is a classic cartel arrangement wherein Southern has promised its monopolistic local distribution company customers that if it bypasses their system to serve an end-user directly, Southern will receive punishment int he form of absorption of the LDC's take-or-pay bill. This is anticompetitive....").

The trial court somehow finds antitrust immunity in the take-or-pay settlement agreement approved by the FERC. The court relies on *Williams v. Electric Co. v. Honewell, Inc.*,772 F.Supp. 1225 (N.D.Fla. 1991) when that case is clearly distinguishable. Then the court brushed aside *Helicopter Support Systems v. Hughes*, 818 F.2d 1530 (11th Cir. 1987), though that is controlling.

First, Southern's federal antitrust immunity defense must fail because it did not raise that affirmative defense by the pleading. Instead, Southern pleaded state action immunity as an affirmative defense. (R1-57).

Secondly, Southern's filing of its take-or-pay settlement agreements with the FERC were nothing more than mandatory rate filings in compliance with FERC Orders no. 436 and 500, and are not sufficient to confer antitrust immunity on the proposed conduct. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 807 (2nd Cir. 1983) *cert. denied*, 464 U.s. 1083 (1984); *Ticor Title Insurance Co. v. Federal Trade Commission*, 922 F2d 1122,

1125 (3rd Cir.) *cert granted* (1991). FERC's approval of the take-or-pay settlement agreements could hardly constitute the requisite enactment of new government policies or regulations. Mere passive proforma rubber stamping cannot be transformed into concerted government action. 1 P. Areeda & H. Hovenkamp, Antitrust Law, Sec. 206.1, p. 81 (Supp. 1991).

Additionally, antitrust immunity under the state action exemption cannot apply to Southern and Alagasco, because the only regulatory agency involved in this case is FERC and there is no express antitrust immunity for FERC-approved transactions. Department of Energy Organization Act, 42 U.S.C. 7101-7352 (Supp.1981). FERC-approved tariffs and transportation agreements are subject to antitrust review and challenge. *Illinois v. Panhandle Eastern Pipeline Co.*, 730 F.Supp. 826 (C.D. Ill. 1990), aff'd, 935 F.2d 1469 (7th Cir. 1991). See also, *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1177-78 (8th Cir.), *cert. denied*, 459 U.s. 1170 (1982).

Any reasonable trier of fact would conclude from the evidence that Southern and Alagasco were parties to an agreement or conspiracy to restrain trade. Sufficient evidence gives rise to a reasonable inference of a collusive agreement between the respondents to monopolize the resale and delivery of natural gas to a large end-users in the relevant market and conspire to exclude GUA from the business of delivery of natural gas in the relevant market. The evidence tends to exclude the possibility that Southern and Alagasco were acting independently. *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987). Direct evidence of each respondent's knowing participation is not required, instead it may be established through proof of surrounding circumstances. *Key Enterprises of Delaware, Inc. v. Venice Hosp.*, 919 F.2d 1550, 1563 (11th Cir. 1990) (quoting *Unites States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252-54 (1940).

4. Southern Denies A Tap To Service Tuscaloosa Steel Company

Another circumstance that points to a conspiracy or agreement in restraint of trade is GUA's attempt to get a tap in the Tuscaloosa area. When GUA attempted to get a tap to service Tuscaloosa Steel Company, Southern denied the tap under its alleged bypass policy. Tuscaloosa Steel was a customer of Alagasco. However, the gas Alagasco transported to Tuscaloosa Steel was from the Coronado line shipped through Alagasco's line. The gas never was transported at all through Southern. Nevertheless, Southern denied the tap to Tuscaloosa Steel because in part, it did not provide Southern "incremental volume." Any amount of volume to Tuscaloosa Steel was additional gas for Southern Natural Gas. Once again, Southern's policy is not implemented as it is stated. And the only thing that is consistent about the policy is that no competitor or potential competitor of Alagasco ever gets a tap.

5. Southern's Illusory Offer to Transport Gas

Each time that Southern denied a tap it would say that it would be happy to transport gas for Gas Utilities to any then existing delivery point. However, this was an empty offer without any practical value since all delivery points on Southern in Alabama are controlled by Alagasco.

6. Southern's New Bypass Policy

An additional circumstance indicating an agreement of restraint of trade is that in 1990 and early 1991, Southern was negotiating to acquire North Carolina Natural Gas Pipeline. North Carolina Natural Gas Pipeline's major asset was a local distribution company in North Carolina. There was a great deal of concern in the industry that Southern was

going to enter the local distribution company business in competition with its local distribution company customers. The customer who called Southern with these concerns was Mike Warren of Alagasco. Mike Warren called Ron Gardner asking him whether Southern had changed the focus of their business in its proposed acquisition. In response to this concern by Alagasco, Southern announced a new direct connect policy of February 7, 1991. For the first time it was written. It was mailed to all of Southern's customers. (Major depo. 215-217; Matthews depo. 127-129; 130; Gardner depo. 269-270; Warren depo. 42). Ron Gardner identified Mike Warren as being the customer who called Southern and expressed concern about the change and shift in the business emphasis of Southern. (Gardner depo. 268-269). The new policy expressly provided that Southern will not grant a direct connection in any area which is presently being serviced by one of their resale customers. The net effect of that policy is if in the perception of Southern any of their local distribution customers could service an industrial customer, then Southern will not then grant a tap to any competitor to serve that industrial customer. Once again this is a blatant restraint of trade. The question is whether there is an agreement. Since the policy was adopted as a result of a direct invitation by Mike Warren, there is strong circumstantial evidence of an agreement.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner demonstrated that it was prepared to enter the relevant market. GUA would have provided gas to its customers but for Southern's wrongful refusal to grant GUA a tap. GUA demonstrated a series of agreements between respondents which by their very nature were anti-competitive. Wherefore, petitioner requests and prays that this Court grant the petition for certiorari, reverse the judgments and opinions below, and remand for trial on the merits.

Respectfully submitted,

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APPENDIX A

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U.S. DISTRICT COURT
N.D. OF ALABAMA

ENTERED
AUG 12 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GAS UTILITIES COMPANY OF ALABAMA, INC. PLAINTIFF,	)	
V.	)	
SOUTHERN NATURAL GAS COMPANY	)	CV-91-PT-00445-S
and	)	
ALABAMA GAS CORPORATION DEFENDANTS.	)	

MEMORANDUM OPINION

Plaintiff Gas Utilities Company of Alabama (GUA) filed this suit against Southern Natural Gas Company (Southern) and Alabama Gas Corporation (Alagasco) alleging violations of the Sherman Antitrust Act as well as tortious interference with business relations. Pending before the court are defendants' motions for summary judgment filed on February 28 and deemed submitted on May 18, 1992.

FACTS

The following is a summary of the undisputed facts in this case. Defendant Southern owns and operates an interstate pipeline for natural gas which runs from Texas through Alabama to South Carolina. The company sells and transports the gas to local distribution companies (LDC) which distribute gas to individual customers as well as to industrial end users.[1]

Defendant Alagasco is a local gas distribution company that provides natural gas service at retail to residential, commercial and industrial customers in Alabama. Alagasco obtains its gas from three sources. Southern is its principal supplier of natural gas. Alagasco also receives a portion of its gas supply from Transcontinental Gas Pipe Line Corporation ("Transco"). A portion of Alagasco's supply consists of gas produced in Alabama.

Plaintiff GUA is an Alabama corporation formed by Dan Tutcher and Ray Levier in 1989. Mr. Tutcher is president, secretary and treasurer of Midcoast Natural Gas, which engages in the business of natural gas pipelining and marketing. Tutcher Deposition at 22. Mr. Levrier is employed by Midcoast Marketing and REL Resources, Inc., which trades in heavy fuel oil as well as natural gas marketing. Levrier Deposition at 6-8. Tutcher and Levrier formed Gas Utilities to solicit direct connections between Magnolia interstate pipeline and industrial and users in Central Alabama. Tutcher Dep. at 57. The record does not specify when GUA made the decision to solicit direct connections between Southern's interstate pipeline and

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1. Southern's Brief in Support of its Motion for Summary Judgment at 3. In its brief, Southern maintains that it has not directly connected any end user within the past twenty years.

industrial end users. Essentially, GUA would function as an intrastate pipeline company which would build alternative pipelines to service industrial customers, including those of Alagasco, in Central Alabama. GUA's pipelines would lead directly from Southern's interstate pipeline to industrial customers. According to Tutcher, GUA sought to undercut the return charged by LDC's such as Alagasco to industrial customers. Tutcher Deposition at 66.

The following facts are disputed by the parties. Tutcher and Levrier claim that, prior to forming their company, they performed a market study and personally contacted approximately forty potential customers to survey the market for natural gas they expected to offer. Affidavit of Dan Tutcher at 3. The company then obtained two contracts with Gurney Industries and Tuscaloosa Steel. *Id.* Plaintiff asserts that GUA then attempted to secure two taps from Southern to service these potential clients. *See* Letter from Dan Tutcher to Mark Limbaugh, Manager, Market Development, Southern Natural Gas Co., November 16, 1989 and December 14, 1989. Mr. Tutcher claims that, in both cases, Southern referred to a company policy which prevented it from granting the taps to GUA. Plaintiff's Response at 3. Southern's letter to Tutcher indicated, however, that GUA should contact it if GUA decided to modify its request to provide for the use of an existing delivery point in the Tuscaloosa area. Letter from Mark Limbaugh to Dan Tutcher, December 5, 1989. GUA submitted a total of three requests for construction of new taps to Southern.

Southern acknowledges that it has denied the taps to GUA and has set forth its rationale for denying the use of the taps to GUA. Essentially, Southern asserts that the construction of new taps to allow industrial and users of gas

to bypass[2] LDC customers such as Alagasco is not in the company's business interest for two reasons. First, Southern claims that construction of new taps could result in its losing recovery of "take or pay" costs.[3] Further, Southern asserts it cannot be held liable under the antitrust laws for this settlement because it was authorized by FERC a federal regulatory agency. In support of this contention, Southern points to *Williams Elec. Co. Inc. V. Honeywell, Inc.*, 772 F. Supp. 1225, 1229 (N.D. Fla. 1991) in which the court held that "private parties are shielded from federal antitrust liability where their actions were regulated by a federal regulatory agency acting pursuant to congressional authority." *See also Medical Ass'n v. Schweiker*, 554 F. Supp. 955, 966 (M.D. Ala. 1983), *aff'd per curiam*, *Medical Ass'n v. Heckler*, 714 F.2d 107, 108 (11th Cir. 1983) ("private parties, to the extent they are acting at the direction or with the consent of federal agencies also fall outside the pale of the [Sherman] act's prohibition.")

Second, Southern asserts that it had reason to believe that the residential and commercial markets for natural gas would be eroded if it allowed industrial customers to bypass the LDC's. Specifically, Southern was concerned that

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2. The term "bypass" refers to the construction of a pipeline to connect an industrial customer directly to an interstate pipeline without using the facilities of the industrial customer's LDC. Major Deposition at 160.

3. "Take or pay" provisions in long term gas supply contracts require Southern to pay for gas covered by the contract, whether or not it takes the gas. In 1988, Southern and its LDC customers reached a settlement which permitted Southern to pass a portion of these take of pay costs to customers. This settlement, which was approved by the FERC, contained a term which would permit an LDC such as Alagasco to reduce its share of the take or pay costs in proportion to the amount of any load which the LDC lost to the pipeline in the event of a bypass. Matthews Deposition at 97.

LDC's such as Alagasco would need to raise their rates to commercial and residential consumers to recover costs from a smaller customer base. This, in turn, could result in an overall decrease in demand for residential gas.[4] In addition, Southern asserts that prices charged to industrial customers were used to subsidize residential and commercial customers. To avoid such a decrease, Southern claims that it unilaterally adopted a policy in 1988 that it would construct new delivery points for industrial end users only if the end user's load could not be served through an existing delivery point and if Southern had concluded that construction of such a new delivery point would be in Southern's best interests. Major Deposition at 111-112; Limbaugh Deposition at 11.[5] Southern claims that, pursuant to this policy, it rejected GUA's requests for delivery points to be constructed, since all end-users which GUA had identified could be served through existing Southern delivery points which were already connected to Alagasco's system. Southern's Brief at 11. Southern asserts that it did not consult with Alagasco regarding this decision to deny GUA the taps and denies that Alagasco played any role in this decision.

GUA asserts that after Southern had denied it the new taps, a representative of Southern suggested to Tutcher that

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4. It was apparently this argument that led to plaintiff's motion for this judge to disqualify himself. The court denied the motion because, regardless of who makes the argument, the potential for some effect on this judge's family's interest is remote. (As a matter of interest, Grace Petroleum has *already* closed its well). Plaintiff's argument has a horseshoe nail and kingdom type theory which was rejected, in another context, in *Holmes v. Securities Investor Protection Corp.*, 60 U.S.L.W. 4255 (March 14, 1992) (Scalia, J., concurring).

5. Mr. Limbaugh's deposition indicated that the possibility of incremental business was one factor which Southern considered in determining whether to grant the use of a tap.

he contact Hunt Refining to request that Hunt permit GUA to use the tap that interconnected with Southern. After being contacted by Tutcher, Hunt responded that it could not do so without consulting with Alagasco. Alagasco subsequently refused to grant this permission. Plaintiff's Brief at 45. Deposition of Dan Tutcher at 276-278.

GUA maintains that a representative of Southern has indicated that the company denied the tap to service Tuscaloosa Steel because it did not provide Southern with additional volume. Plaintiff's Response at 14.[6] According to GUA, this reasoning for denying the tap was specious since the gas provided to Tuscaloosa Steel would have meant additional volume transported through Southern's line.[7] Tutcher's Deposition at 533-534.

In addition, GUA contends that Southern's fears that it would have to allow all industrial customers to bypass the LDC's, should it grant one bypass, lacks foundation. GUA has not specifically explained the nature of these flaws in Southern's analysis, which it has termed the "death spiral

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6. Tutcher wrote to D. Mark Limbaugh, a Southern employee, on December 6, 1989. He stated that he was summarizing Southern's refusal to construct a new delivery point for GUA. The first rationale was the possibility of an economic benefit for Southern. Exhibit 103 to Tutcher's Deposition. While Mr. Limbaugh indicated in his deposition that the potential for increased volume was a consideration used by the company in determining whether to grant a tap, none of the materials furnished by GUA to the court contain a statement to the effect that Southern denied GUA a tap to service industrial end users because such service would not provide Southern with the possibility of transporting increased volume.

7. While Tuscaloosa Steel was a customer of Alagasco, the gas was transported to the mill through the Coronado line shipped through Alagasco's line. Southern had never transported this gas to through its line.

theory" in its briefs. GUA also disputes Southern's presentation of its "bypass policy" argument. According to GUA, Southern prepared an analysis of bypass potential in 1987 in which it allegedly determined that bypass could be beneficial to the company. Plaintiff's Response at 17. Despite this determination, Southern announced a bypass policy which was never committed to writing and which did not mention this 1987 study.[8] In their depositions, company officials stated that Southern would not grant a direct connection unless (1) the tap requested was not capable of being served through an existing delivery point; and (2) it was in the overall business interest of the company to provide the tap. Major deposition at 111.[9] In 1991, Southern adopted a new policy regarding when it would bypass one of its LDC's. This policy, which was committed to writing, provided that Southern would not grant a direct connection for any industrial customer in an area presently served by a resale customer such as Alagasco. Major Deposition at 215-217; Plaintiff's Brief at 23-24.

GUA also discusses Alagasco'a attempt to bypass Southern. According to GUA, in 1985 Alagasco allegedly applied for a tap at Transco. Warren Deposition, Volume II at 15-16. Southern intervened in the proceedings before the Alabama Public Service Commission to prevent the issuance to Alagasco of a Certificate of Public Need and Necessity. Major Deposition at 74-80. GUA maintains that Sonat

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8. William Major, general counsel for Southern,, William Matthews, the company's president, and Ron Gardner, allegedly adopted this policy.

9. In its brief, GUA maintains that Major's version of the policy differs from that propounded by Matthews and Gardner. Plaintiff's brief at 19. GUA claims that Major had testified that Southern would not grant a bypass unless there was incremental volume from the direct connection. However, after reviewing Major's deposition, the court concludes that three gentleman presented the same version of the policy.

Intrastate, Southern's intrastate affiliate, also reacted to Alagasco's actions by soliciting Alagasco's customers in the Tuscaloosa area to directly connect to them.[10] Alagasco then allegedly reacted by filing a complaint against Sonat Intrastate before the Public Service Commission, alleging that Sonat Intrastate should be subject to the jurisdiction of the Commission. Warren Deposition at 22-25. Both of these complaints were dismissed by mutual agreement. Major Deposition at 84-85.[11]

In its submissions to the court, Alagasco has discussed its response to the competition which it perceived GUA posed. According to Alagasco, industrial end users of gas subsidize the service provided to Alagasco's residential and commercial ratepayers. Warren Deposition at 162. Moreover, Alagasco argues that it faces competition for its industrial customers from other sources, including producers of alternative fuels and other providers of natural gas. Memorandum of Law in Support of Defendant Alabama Gas Corporation's Motion for Summary Judgment at 5-6. In light of the importance of its industrial customers, Alagasco claims that the Alabama Public Service Commission has authorized it to use several devices to retain and compete for industrial customers, including a "Special Contract" with an individual customer[12] and a "Competitive Fuel Clause".[13]

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10. GUA provides no evidence of this.

11. GUA asserts that these actions are indicative of an agreement between Southern and Alagasco. This theory will be discussed more fully, *infra*.

12. A Special Contract is a contract between Alagasco and an individual customer which permits Alagasco to provide the customer with a rate which is lower than the standard tariff. Warren Deposition at 251-255.

Alagasco asserts that it responded to the competitive challenge which it perceived that GUA presented, by using these devices. For example, Alagasco claims that its industrial marketing representatives informed certain industrial customers that Alagasco would remain competitive through the use of the Competitive Fuel Clause or the Special Contract. Wright affidavit. In addition, Alagasco lowered its transportation rates for certain customers after learning that GUA had quoted a price to a customer. These customers include Union Camp Corporation, which operates a paper mill in Prattville; Tuscaloosa Steel, which operates a steel mill in Tuscaloosa; and Phifer Wire Products, which manufactures various wire products at its Tuscaloosa plant. Alagasco claims that if it had known that Southern would deny GUA its taps, it would not have lowered its transportation rates to these customers. J. Hawkins Deposition at 20.[14] Alagasco also offered evidence that it had a policy not to solicit any industrial accounts which were already served by an existing pipeline. J. Hawkins Deposition at 31-37.

GUA's interpretation of Alagasco's actions differ. First, GUA asserts that Alagasco obtained exclusive dealing contracts with customers, which GUA had contacted, which foreclosed future competition from companies such as GUA. Moreover, GUA claims that Alagasco allegedly acted as

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13. A Competitive Fuel Clause permits Alagasco to lower its transportation rate to meet a rate offered by a competing energy source. Warren Deposition, Vol 3, 59-60. If Alagasco invokes the Competitive Fuel Clause, the Alabama Public Service Commission is informed.

14. Alagasco claimed that it has also reduced its transportation rates to certain industrial customers based upon a fear of competition from Southern. Memorandum at 15.

Union Camp's[15] agent and entered into a more favorable purchase agreement with Southern Marketing, a Southern affiliate. In addition, GUA claims that the chronology of events surrounding Alagasco's reduction of its rates to selected industrial customers suggests that this discounting was a sham to mislead GUA into thinking that the company had acted competitively. According to GUA, Alagasco agreed to reduce its rate to Tuscaloosa Steel on January 2, 1990, after Tuscaloosa Steel had entered into a contract with GUA. GUA claims that Alagasco knew, however, that Southern had denied the taps to GUA before it reduced its rates.[16] Alagasco allegedly rescinded its offer to reduce the rates several months after Southern denied the tap to GUA. J. Hawkins Deposition at 257.

Defendants and plaintiff disagree as to the level of preparation which Tutcher and Levrier undertook with regard to the formation and development of GUA and its planned business. In an affidavit, Tutcher maintains that he and Levrier consulted several times with the Alabama Public Service Commission to determine if GUA's "direct connections" to industrial customers were permitted. They allegedly also discussed the issue of eminent domain and the use of public right of ways. Tutcher affidavit at 5. Mr. Tutcher also consulted with Unitec, a company which performed routing, right of way, and survey services. Unitec allegedly referred GUA to two construction companies to perform pipe laying cost analysis.

Concerning the financial aspects of the business, Tutcher asserts that he and Levrier had prepared financial

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15. One of GUA's prospective "end users".

16. GUA claims that Alagasco had access to this information because its computer is linked with Southern's.

projections and proformas concerning the economic viability of the services which GUA was to perform.[17] Moreover, Tutcher contends that Texline, Inc, a Texas company, had made a commitment to finance the project. Tutcher Affidavit at 5. Kenneth Holmes and Steven Herbst, the principals of Texline, had been involved in business with Mr. Tutcher in a company named Midcoast Transmission. Holmes deposition at 27. In his deposition Mr. Holmes stated that Texline would have provided financing to Gas Utilities *if the project had met the company's economic criteria*. Holmes indicated, however, that Tutcher *had never requested financing for a specific pipeline*. Mr. Herbst, the second principal, indicated that the company would have provided financing *had GUA presented it with a definitive project*. Herbst Deposition at 105. In addition, Tutcher himself stated in an affidavit presented to the court that he would have financed the project. He never stated this in his deposition nor provided evidence of how he would have accomplished it.

Both Southern and Alagasco maintain that GUA was inadequately prepared to engage in business with industrial customers. According to the defendants, GUA had no capital other than $1,000.00 of start up funds, no offices, no credit, and no operational history. Southern's Brief at 9. Alagasco's Memorandum at 10.[18] Tutcher and Levrier were the only employees of the company and did not receive any salary. Defendants maintain that GUA had no third party financing commitment and never hired any professionals to develop plans for a pipeline. Defendants

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17. In his affidavit, Tutcher refers to exhibits of these proformas and projections. None have been filed or submitted to the court.

18. Tutcher and Levrier's depositions provided this information regarding GUA.

also claim that GUA never ascertained whether it would be subject to any regulatory authority nor applied for any permits or rights of way. *Id.* Moreover, defendants claim that the contracts which GUA had allegedly entered into were illusory since they contained *force majeure* type provisions which would excuse GUA's performance should the company be unable to secure rights of way or permits. Both were voidable upon adverse regulatory rulings. Southern's brief at 18; Gas Purchase and Sales Agreement between Gurney Industries and GUA, Exhibit 122. Neither became effective until the date of first delivery.

LEGAL CONTENTIONS OF THE PARTIES

After Southern refused to allow GUA to utilize taps, GUA filed this suit in March, 1991, alleging violations of federal antitrust laws and tortious interference with business relations in violation of state law. GUA set forth the bases for its claims in its third amended complaint.

SECTION ONE CLAIM

In count nine of its amended complaint, GUA alleges that Southern and Alagasco had an agreement/understanding that Southern would not provide access to GUA to its interstate pipeline for the benefit of the end users which Alagasco was serving or which Alagasco could serve. GUA claims that this agreement violates Section 1 of the Sherman Antitrust Act.[19]

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19. In its brief, GUA refers to a dissent by a FERC commissioner commenting on the load loss provision contained in Southern's FERC-approved order settlement with its LDC customers. In this dissent Commissioner Stalon stated, "This is a classic cartel arrangement wherein Southern has promised its monopolistic local distribution company customers that if it bypasses their system to serve an end user directly, Southern will receive punishment in the form of absorption of the LDC's

To prevail under Section 1, GUA must satisfy a two part test.[20] First, GUA must demonstrate that the conspiracy is economically reasonable and would be economically beneficial to defendants. Second, GUA must adduce evidence of an *agreement*. Evidence that tends to exclude the possibility that the alleged conspirators acted independently and in a manner consistent with rational business objectives will satisfy this standard. *Bolt v. Halifax Hosp. Medical Center*, 891 F.2d 810, 820 (11th Cir. 1990); *Monsanto Co. V. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). GUA may rely on either direct or circumstantial evidence in meeting its burden of proof. *American Tobacco Co. V. United States*, 328 U.S. 781, 809-810. (1946)

GUA advances the following arguments in support of its claims that Southern and Alagasco were parties to an agreement to restrain trade. First, GUA maintains that by obtaining exclusive dealing contracts with customers that GUA had contacted and by entering into a new and more favorable purchase agreement with Southern Marketing, Alagasco collaborated with Southern to foreclose any competition. In addition, GUA claims that Alagasco's rate reduction to potential GUA customers *following* Southern's denial of the taps, was not a manifestation of Alagasco's

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take or pay bill. This is anticompetitive ..." 46 FERC §61, 336. The Commission did, however, approve the settlement.

20. Section 1 provides "Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. §1. An agreement may be illegal if its purpose or effect is to create an unreasonable restraint of trade or a *per se* violation of the statute. A restraint is unreasonable if it has an adverse impact on competition and cannot be justified as a procompetitive measure. *Seagood Trading Corp. v. Jerricho, Inc.*, 924 F.2d 1555 (11th Cir. 1991).

desire to compete with companies such as GUA. Instead, Alagasco was "hedging its bets", since Alagasco did not completely trust Southern. Plaintiff's Response at 5.

GUA's also asserts that the conspiratorial nature of Southern and Alagasco's conduct is manifested through "conscious parallelism." *See American Tobacco Co., supra*, (holding that the existence of a conspiracy could be premised upon parallel pricing in competitive bidding behavior.)[21] GUA recognizes that to prevail with this argument it must come forward with significant evidence supporting its theory of conscious parallelism and negating the possibility of independent action. In addition, GUA must show that the decisions not to deal were contrary to the defendants; economic self-interest so as to raise an issue as to their good faith business judgment. *Dunnivant v. BI State Auto Parts* 851 F.2d 1575, 1583 (11th Cir. 1989). In support of this contention, GUA has argued that there is evidence that Alagasco's rate reduction was illusory and "not the type of reaction that a business would make if it perceived a real economic threat." Plaintiff's Brief at 14.

GUA also claims that Southern has failed to demonstrate economically sound business reasons for refusing to grant it a tap to service a variety of customers in the Tuscaloosa area, including Tuscaloosa Steel.[22] Since granting GUA a tap to service Tuscaloosa Steel would have resulted in increased volume for Southern's line, GUA claims that sound business practice would have dictated granting a tap to GUA.

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21. GUA has not explained how Southern and Alagasco's conduct is parallel.

22. Southern maintains that GUA had never specified its prospective customers when it requested the tap.

GUA also claims that ample circumstantial evidence exists which supports a finding of the existence of an agreement in restraint of trade. First, plaintiff points to the previously discussed agreement which Southern and Alagasco entered into to dismiss the complaints which each organization had filed against the other before the Alabama Public Service Commission. Plaintiff alleges that, after the defendants entered into this agreement, Southern never sought to solicit a direct connection in the Alabama area. Warren Deposition at 28. [23] Plaintiff also claims that, since the agreement, Alagasco has not sought another tap from Transco. Wiseman Deposition at 56. Second, plaintiff asserts that Alagasco's policy not to solicit any industrial accounts which were already served by an existing pipeline company is further evidence of an agreement not to compete, since a "rational" business would seek to solicit its competitor's business. Plaintiff's Brief at 17.

GUA also argues that the numerous opportunities Southern and Alagasco had to meet and agree is evidence of an agreement. GUA points to meetings and social gatherings, such as quail hunts, at which Alagasco and Southern executives had the occasion to mingle. A fourth agrued circumstance pointing to an agreement was the alleged inconsistency in Southern's bypass policy.[24] Plaintiff cites *Bell v. Dow Chemical Co.*, 847 F.2d 1179,

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23. The portion of this deposition on which plaintiff purports to rely does not state that Southern has never sought another direct connection. Instead, the deponent stated that he was *unaware* of any additional contacts with industrial customers.

24. As previously discussed, Southern executives set forth a policy which dealt with the granting of a bypass. Major Deposition at 112. Tutcher, however, maintains that Mark Limbaugh, a Southern representative, gave him different reasons for denying the taps.

1186 (5th Cir. 1988) for the proposition that such inconsistencies are indicative of an agreement.[25]

Plaintiff asserts that the "SURF" agreement between Alagasco and Southern is also indicative of a conspiracy.[26] Pursuant to these agreements, Alagasco and other LDC's were not obligated to take their proportionate share of gas from Southern if Southern directly connected any customers previously serviced by these LDC's. None of the SURF agreements has received final approval from the FERC. GUA also claims that the high rates paid by consumers of natural gas in Alabama manifests that there is an agreement to eliminate competition. Another circumstance which GUA claims indicates that an agreement exists between Alagasco and Southern are the "flaws" which GUA claims underlie the previously discussed "death spiral theory."[27] SUA also suggests that the "take or pay" negotiations between Southern and customers such as Atlanta Gas Light, Alagasco and South Carolina Natural Gas are also indicative of a conspiracy. At these "take or pay" negotiations, Alagasco and Atlanta Gas Light allegedly raised questions regarding bypass and direct connection. According to GUA, Southern agreed with its LDC customers, including Alagasco, that it

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25. After reviewing *Bell*, the court concludes that the case does not stand for the proposition that inconsistencies in a defendant's testimony were indicative of a conspiracy. Instead, the *Bell* court discussed inconsistencies in defendant's testimony concerning the reasons why he had refused to sell to the plaintiff. These inconsistent rationales raised a factual issue as to whether the defendant had a justified purpose in refusing to sell to the plaintiff.

26. The SURF negotiations refer to negotiations of long term service agreements between Southern and LDC customers. Alagasco's reply brief at 5.

27. As previously mentioned, plaintiff neglects to point out what these flaws are or how they manifest an agreement.

would forfeit a portion of the take or pay settlement from the customer if it directly connected. GUA disputes Southern's contention that the settlement agreement, which was authorized by FERC, is immune from antitrust immunity. [28] According to GUA, Southern's filing of the take or pay agreements with FERC were only mandatory rate filings in compliance with FERC Orders no. 436 and 500 and could not confer antitrust immunity. *See* 1 P. Areeda & H. Hovenkamp, *Antitrust Law* Sec. 206.1 p. 81 (1991) (stating that pro forma rubber stamping cannot be transformed into concerted governmental action.) Plaintiff also cites *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) for the proposition that Southern's filings of the take or pay settlement agreements with FERC were only mandatory rate filings which could not confer antitrust immunity.

The following four circumstances constitute GUA's final arguments that there is a reasonable inference of an agreement between Alagasco and Southern. The first is Alagasco's reliance on gas provided by Southern, and its failure to purchase local gas, which GUA claims is not rational behavior. Plaintiff's Brief at 22. Second, GUA claims that Southern's refusal to grant a tap to GUA to service Tuscaloosa Steel was also indicative of such an agreement.[29] Third, GUA maintains that Southern's claims that it would transport gas for GUA to existing delivery points was illusory since Alagasco controlled all delivery

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28. *See supra* p. 4

29. As previously discussed, GUA maintains that this refusal conflicts with Southern's policy of granting a tap if it would provide "incremental volume." Since Tuscaloosa Steel had not previously received gas from Southern's line, a tap from GUA would have provided Southern with increased Volume.

points on Southern's line.[30] Finally, GUA asserts that Southern's adoption of a direct connection policy in 1991 manifested an agreement between Southern and Alagasco, since Southern had acted upon a direct invitation from Mike Warren, an Alagasco official, in adopting this policy.[31]

Having presented evidence which it believes establishes the existence of an agreement, GUA discusses the economic reasonableness of the alleged conspiracy. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (an antitrust plaintiff may survive summary judgment if the conspiracy is rational and practically feasible.) GUA asserts that Southern and Alagasco have enjoyed "monopoly" profits since they control the supply and pricing of natural gas in Alabama. Plaintiff's Brief at 25. GUA maintains that Southern's and Alagasco's alleged dominance prevented GUA and other competitors from entering the market and suggests defendants' incentive for excluding them.

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30. GUA has not indicated how Alagasco controlled the delivery points on Southern's line. The court surmises that GUA may be referring to its conversations with an employee of Hunt Refining, discussed more fully below. According to GUA, a Southern employee had suggested to Mr. Tutcher that he contact Hunt Refining about utilizing one of its taps in the Tuscaloosa area after it had denied GUA its tap. A Hunt employee allegedly informed Tutcher that the company needed to contact Alagasco before it could grant permission to allow GUA to utilize its tap. Alagasco allegedly notified Hunt that it was opposed to the idea of Hunt granting GUA a tap.

31. The circumstances surrounding the adoption of this new policy are as follows. In 1991, Southern was allegedly seeking to acquire North Carolina Gas Pipeline whose major asset was a local distribution company. According to GUA, Southern's intended acquisition of this LDC produced concern among Southern's LDC customers. GUA claims that, following calls to Southern from Alagasco's Warren and others, Southern adopted a new policy concerning direct connection.

SECTION TWO CLAIM

GUA also claims that Alagasco and Southern's actions violate Section 2 of the Sherman Antitrust Act.[32] The United States Supreme Court has defined monopolization as "the possession of monopoly power coupled with the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior project, business acumen or historic acts." *United States v. Grenell Corp.*, 384 U.S. 563, 570-571 (1966). There are two elements to a conspiracy to monopolize: (1) concerted action by knowing participants who made specific attempts to achieve a monopoly and (2) the commission of at least some overt act in furtherance of a conspiracy. Monopoly power is "the power to control price or exclude competition." *United States v. E.I. Dupont De Nemours & Co.*, 351 U.S. 377, 391 (1956). A monopoly may be inferred from a participant's having a predominant share of the market. *Grenell, supra*, at 671.

GUA claims that defendants have violated Section Two for the following reasons. First, GUA argues that Southern is the only interstate pipeline capable of servicing industrial end users in the relevant market area[33] and has

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32. This section states "Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C. §2.

33. The relevant market area encompasses approximately ten miles on either side of Southern's interstate pipeline system in Central Alabama. Wilson affidavit. Southern has reserved its right to contest this market definition.

refused to grant a tap to GUA. GUA asserts that Alagasco has also denied access to its facilities through its actions with regard to Hunt Refining.[34] Therefore, each defendant has maintained its monopoly by preventing companies such as GUA from entering the market. Essentially, GUA claims that Southern sacrificed the opportunity to increase its load by granting a tap to service Tuscaloosa Steel in exchange for the assurance that Alagasco would not transfer its load to another pipeline such as Transco.

GUA also maintains that Southern has violated Section 2 because it has failed to make available an essential facility to GUA.[35] The four elements necessary to establish liability under the essential facilities doctrine are: (1) Control of the essential facility by a monopoly; (2) the competitor's inability to practically or reasonably duplicate the essential facility; (3) the denial of the use of the facility to the competitor; and (4) the feasibility of providing the facility. *Aspen Highland Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984).

GUA claims that the evidence demonstrates all of these elements. First, GUA asserts that it is undisputed that Southern retains control of its pipeline and will only grant

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34. As previously discussed, Southern had suggested that GUA contact Hunt Refining to obtain a tap from Hunt's interconnection with Southern's line. Allegedly, a Hunt employee informed Tutcher that it would have to consult with Alagasco before it could permit GUA to take gas from Hunt's interconnection. Hunt allegedly denied GUA the right to obtain a tap after Alagasco denied it permission to grant the tap.

35. Firms controlling an essential facility have the obligation to make the facility available on nondiscriminatory terms, and the failure to do so subjects them to Section 2 liability. *MCI v. American Telephone & Telegraph*, 708 F.2d 1081, 1132 (7th Cir.), *cert. den.* 464 U.S. 891 (1983).

connections to its pipeline to Alagasco. Second, GUA's expert has testified that it would be prohibitive to duplicate Southern's pipeline. Wilson Affidavit.

Further, that GUA has been denied use of the facility when it would have been feasible to do so.

Standing

Having discussed the merits of its antitrust claims, plaintiff next discusses the issue of standing. To maintain an action under the antitrust laws, a plaintiff must meet the criteria of Section 4 of the Clayton Act. Specifically, a plaintiff must meet a three part test: (1) that he is a "person" within the meaning of the Clayton Act; (2) that he was "injured" and the injury was of the type the antitrust laws were enacted to prevent; (3) that the injury affected his business or property; and (4) that the injury occurred "by reason of" a violation of the antitrust laws. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), (quoting *Brunswick Corp. v. Pueblo Bowl O Mat. Inc.* 429 U.S. 477 (1977).

GUA contends that courts have utilized a two prong approach in determining if a plaintiff has standing. First, it must be determined if a plaintiff has suffered "antitrust injury". *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1448 (11th Cir. 1991). The second issue is whether the plaintiff is an efficient enforcer of the antitrust laws.[36]

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36. This determination focuses upon the status of the plaintiff as a direct target of the defendant's anticompetitive conduct or it being within the target zone of competitive restraint.

GUA asserts that it has suffered antitrust injury in the following manner.[37] First, GUA asserts that Southern's refusal to grant GUA's requests for taps to supply end-users, including Tuscaloosa Steel and Gurney Industries, has precluded the possibility of effective market competition in the area.

To recover for an injury that is the consequence of a frustrated attempt to enter a market, plaintiff must demonstrate an intent to enter the business coupled with a showing of preparedness to enter the business. *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987).[38] Factors which indicate that a plaintiff is prepared include "the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment, the consummation of contracts by the plaintiff; affirmative action by plaintiff to enter the business; and the background and experience of plaintiff to enter the prospective business." *Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d 306 (5th Cir. 1985), *cert. den.*, 479 U.S. 816 (1986).

GUA contends that it has manifested the requisite level of intent and preparation to enter the gas distribution market. It argues that its preparation is evinced by its

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37. To prove an antitrust injury, plaintiff must show an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants; act unlawful. The injury should reflect the anticompetitive effects either of the violation or of anticompetitive effects either of the violation or of anticompetitive acts made possible by the violation. " *Brunswick Corp.*, *supra*, 429 U.S. at 1389.

38. *See also, Thompson v. Metropolitan Multi-List, Inc.* 934 F.2d 1566, 1572 (11th Cir. 1991), *cert. filed*, 60 U.S. L. W. 3522 (19882) (citing *Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.) *cert. den.*, 385 U.S. 991 (1966).

completion of market surveys; *communications* with the Alabama Public Service Commission *regarding* regulation, eminent domain pipeline connection facilities and industrial end users, (Tutcher Affidavit); preparation of a brochure; solicitation of industrial end users; the preparation of proformas (not in evidence); *inquires* and *investigations* into costs and feasibility of pipeline connections; request for pipeline taps; financing "commitments" secured from Texline; purchase and sale agreements with Tuscaloosa Steel and Gurney Industries, Inc.; maps and geographic surveys; and inquiries to FERC. Tutcher Deposition at 503-505.

GUA disputes Southern's assessment of its preparatory measures. First, GUA states that Southern's assertion that the company's financing commitments must be in writing is not supported by the caselaw. It also argues that Southern's claims that GUA was unprepared since it had never laid any pipe is also specious since attempts to lay pipe would have been futile following Southern's denial of the use of its pipes. The court agrees that the latter argument with regard to "laying pipe" has merit.

Concerning the second prong of the standing analysis, GUA argues that it is an efficient enforcer of the antitrust laws since it was in the target area of defendants' conduct. GUA maintains that the defendants directly targeted GUA pursuant to an illegal agreement in restraint of competition. In addition, GUA claims that its injury "coincides with the public detriment tending to result from the alleged violation." *Austin v. Blue Cross and Blue Shield of Alabama*, 903 F.2d 1385 (11th Cir. 1990).

Finally, GUA claims that it has presented evidence of damages and has thereby satisfied the requirement that a private antitrust litigant must prove that he suffered an injury to his business or property. Antitrust caselaw recognizes that

the evidence may show "the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Terrell v. Household Goods Carriers's Bureau*, 494 F.2d 16, 23-24 (5th Cir.), *cert. dis'd*, (419 U.S. 1974). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("The Supreme Court has recently reminded us that trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts.") GUA has offered estimates of the damages which it claimed it suffered-namely revenues which could have been realized absent defendants' actions. J. W. Wilson and Associates, plaintiff's economic expert, compiled these estimates. Therefore, plaintiff contends that it has offered sufficient proof on the issue of damages.

Tortious Interference with Contractual and Business Relations Claim:

In its final court, GUA accuses defendants of the tort of interfering with its contractual and business relationships. Under Alabama law, the elements of this cause of action are (1) the existence of a contract or business relationship; (2) defendants' knowledge of the contract or business relations; (3) intentional interference by the defendants with the contract or business relationships; (4) absence of justification for the defendants to interfere with contract or business relations and (5) damages to the plaintiff as a result of defendants interference. *Bridgeway Communication, Inc. v. Trio Broadcasting, Inc.* 562 S. 2d 22 (Ala. 1990).

GUA asserts that Alagasco has attempted to exclude it from the Alabama market. In response to GUA's solicitations of business, Alagasco disseminated questionnaires to its customers for questions to pose to GUA. GUA's Response at 44. GUA also accuses Alagasco of threatening customers which GUA had contacted. For example, GUA refers to a memorandum from Jeff Lowery, an industrial marketing representative of Alagasco, memorializing a conversation between him and a Mr. Burroughs, an employee of Tampko Asphalt. Tampko had allegedly asked Mr. Lowery if Alagasco would continue to serve a portion of its gas needs should it deal with GUA. In his memorandum, Mr. Lowery indicated that if Tampko did business with another supplier, Alagasco would either keep its facilities in place and charge a standby charge or remove its facilities.[39] Therefore, GUA asserts that Alagasco threatened its customers.[40] GUA also claims that Alagasco's alleged objection to allowing Hunt Refining to provide GUA with a tap also constituted interference with contractual relations.

Concerning Southern, GUA claims that its denials of taps and transportation services constitute affirmative acts of tortious interference. Specifically, it is argued that the threatened act of interference is defendants' illegal agreement in restraint of trade. GUA also claims that if the means used or the objectives sought are illegal, then the interference with another's business relations cannot be justified. *Griese-*

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39. Mr. Lowery indicated to Southern Resins-Lawler International that it would undertake the same steps should Southern Resins negotiate a contract with GUA. Plaintiff's Brief at 45.

40. It would appear to the court that this was a reasonable answer to a question rather than a threat.

Traylor v. First Nat'l Bank, 572 F.2d 1039-1045 (5th Cir. 1978).

In their motions for summary judgment, defendants contend that no claim of plaintiff has merit. The following are a summary of these arguments.

Southern:

Southern's argument can be divided into four sections. First, Southern contends that GUA cannot establish antitrust injury. Second, Southern alleges that GUA has failed to establish a conspiracy which is essential to both its Secion 1 and Section 2 claims. Third, Southern claims that GUA cannot establish the anticompetitive purpose essential to a Section 2 unilateral conduct claim. Finally, Southern contends that it did not tortiously interfere with GUA's business.

Absence of Antitrust Injury:

Under Eleventh Circuit law, an antitrust plaintiff who claims that he has been frustrated from entering the market may prevail only if there is (1) an intention to enter the business; and (2) a showing of preparedness to enter the business." *Cable Holdings, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987), (quoting *Hayes v. Solomon*, 597 F.2d 958, 973, *cert. den.*, 444 U.S. 1078 (1980). To demonstrate preparedness, a plaintiff must satisfy four elements (1) the ability to finance the business; (2) the consummation of contracts; (3) affirmative action taken by the plaintiff to enter the business; and (4) the background and experience of plaintiff in the business. *Hayes, supra*, at 973. Southern contends that GUA cannot satisfy any of these elements.

Southern first contends that GUA lacked the ability to finance its business. According to Southern, a failure to obtain a definite written financial commitment from a financially capable source renders it unprepared as a matter of law. *Hayes, supra*, 597 F.2d 975-976. (negotiations for a bank loan not evidenced by a writing did not constitute a financing commitment.)[41] *See also Jayco Sys. v. Savin Business Machines Corp. supra*, 777 F.2d at 315 (a bank officer's affidavit that she would have extended credit to the business did not indicate preparedness). Therefore, Southern asserts that Texline's willingness to provide financing if certain conditions were met was not sufficient to establish preparedness. [42] In particular, Southern points to a statement made by Holmes that he would have gone to a bank to secure financing. Since Holmes had never presented a GUA project to a bank, there could be no financing commitment.

Furthermore, Southern argues that Tutcher's assertions that he would have financed GUA also do not evidence the requisite preparation. Tutcher Affidavit. First, Tutcher presented no evidence that he could provide such financing and never so stated his willingness or ability in his deposition. Southern argues that Tutcher's assertions are also refuted by the record since the only funding source listed in GUA's tap requests to Southern were letters of credit from banks. Exh. 115 to Tutcher Deposition. Southern argues that pursuant to *Jayco*, Tutcher's discussions of his unsubstantiated personal wealth and his statements that

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41. It is not clear that *Hayes required* a written commitment. The court does seem to suggest the lack of a commitment "evidenced by a bank writing" to be a negative factor.

42. As previously discussed, Texline principals indicated that they would have financed the project had there been a project to finance.

he "would have" provided financing do not indicate that GUA was financially prepared.

Southern next argues that GUA failed to consummate the contracts necessary to enter its business with the exception of the contracts with Tuscaloosa Steel and Gurney industries, which Southern claims are illusory. According to Southern, the Clayton Act will protect only valid contracts. *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-634 (5th Cir.) *cert. den.*, 385 U.S. 991 (1966).[43] Specifically, Southern argues that the Tuscaloosa Steel contract was not a contract since it did not contain a price term and provided that it would expire if the parties did not agree on a price. The Gurney agreement would only become effective the date of the first delivery. Tutcher Deposition at 410. Both contracts also contained *force majeure* type provisions that would excuse GUA's performance is it could not obtain rights of way or permits for construction and maintenance fo facilities.[44]

Third, Southern claims that GUA did not take the affirmative steps necessary to enter business. For example, the Eleventh Circuit had held that a plaintiff must make efforts to carry out construction of new facilities if such construction is required to enter a new business. *Cable Holdings*, *supra*, 825 F.2d at 1562. In *Cable Holdings*, a cable television company brought antitrust monopoly claims against a cable system operator, claiming that the operator

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43. Southern cites *Martin* for the proposition that a contract that contains "infirmities" such as contractual conditions that are impossible to fulfill or the absence of terms that render an agreement enforceable under state law is not a valid contract.

44. Southern has characterized GUA's brochure preparation and solicitations of other potential industrial end users as "preliminary overtures."

had prevented its expansion. Plaintiff had failed to prepare detailed design maps, confer with utility representatives, and hire a contractor to install cable. The court determined that plaintiff was not prepared to begin service and enter the targeted market. *Id.* at 1562. *See also Hayes*, 597 F.2d at 974 (holding that plaintiff, who needed to construct a shopping center, failed to commission the timely drawing of a detailed engineering and architectural plan, and did not meet the Eleventh Circuit test for preparedness.) Southern argues that Tutcher and Levrier did not take any of the necessary steps to construct bypass facilities, including acquiring rights of way, performing surveys, securing government permits, and purchasing pipe. Southern's Brief at 21.

The Eleventh Circuit has also held that failure to obtain governmental and regulatory approvals indicates lack of preparation by an antitrust plaintiff. *See e.g., Cable Holdings, Inc., supra*, 825 F.2d at 1562. Southern asserts that GUA did not take steps necessary to obtain permits to commence construction or to obtain environmental permits. Moreover, GUA did not contact FERC regarding approval of a bypass facility. Tutcher Deposition at 517-520. Southern also dismisses GUA's discussions and communications with FERC and the Alabama Public Service Commission regarding necessary approvals and eminent domain rights as exploratory. According to Southern, courts have held that such preliminary efforts cannot confer antitrust standing. *Parks v. Watson*, 716 F.2d 646, 660 (9th Cir. 1983). [45]

45. Southern also cites *Hayes v. Solomon, supra*, for this proposition. However, the efforts which the court found inadequate to constitute preparation in that case did not constitute preliminary studies as much as studies done in preparation for litigation.

Responding to GUA's contentions that it was futile to take such steps absent a tap, Southern argues that such positions have routinely been rejected. *See, e.g., Jayco Sys. Inc., supra*, 777 F.2d at 314 (holding that the fact plaintiff could not have acquired machines from defendant even had it undertaken adequate preparations did not excuse plaintiff's failure to undertake such preparations). *See also Cable Holdings, Inc., supra*, 825 F.2d at 1561.[46]

Absence of a Conspiracy:

Having discussed the inadequacy of GUA's preparatory efforts, Southern next turns to the issue of whether GUA has established the conspiracy essential to its Section 1 and Section 2 joint conduct claims. Southern claims that GUA has not presented any evidence which would create a reasonable inference that Alagasco and Southern conspired regarding Southern's adoption of its policy not to directly connect end users or with respect to its application to GUA. In addition, Southern contends that its conduct does not support an inference of a conspiracy since "conduct that is as consistent with permissible competition as with illegal conspiracy cannot support an inference of conspiracy." *Matsushita Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574, 588 (1984). Pursuant to *Matsushita*, a plaintiff must produce evidence which shows that the alleged conduct is not "economically implausible" and evidence that "tends to exclude" the possibility that Southern and Agagasco acted independently. Southern asserts that GUA has failed to submit evidence demonstrating either of these requirements.

Concerning the economic plausibility of Alagasco's price cutting to its industrial customers, Southern asserts that

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46. See, however, *Jayco*, 777 F.2d at 315.

it is indisputable that these reductions could only make sense if Alagasco had not entered into an agreement with Southern to refuse to supply competitors such as GUA. In its brief, Southern attempts to demonstrate the flaws in and inconsistencies in GUA's reasoning. For example, GUA first asserts that Alagasco's price cutting was a "sham" to mask the conspiract. GUA later suggests in its brief, however, that this price cutting was predatory conduct. Second, Southern finds fault with GUA's assertions that Alagasco lowered its rates only after it had learned of Southern's denial of the tap requests. Southern argues that the president of Alagasco, Mike Warren, directed its employees to contact the company's customers to inform them that it would compete with GUA, as soon as it learned of GUA's formation in 1989. Warren Deposition at 292.

Southern also disputes GUA's contention that there was a *quid pro quo* whereby Alagasco would refuse to take gas from Transco, Southern's competitor, in exchange for Southern's refusal to connect potential competitors of Alagasco. Southern claims that the record contains no evidence of such an agreement.

Southern next turns to the circumstances which GUA claims do not exclude the possibility that Southern acted independently. First, Southern addresses GUA's theory that Southern and Alagasco mutually agreed to dismiss proceedings each had filed before the Alabama Public Service Commission against the other. Southern contends that there is no evidence from which such a conspiratorial agreement can be inferred.[47] Southern also contends that GUA's theory that Southern and Alagasco had entered into

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47. An official of Southern stated in a deposition that it had withdrawn its complaint because it was evident that it would not prevail. Major Deposition at 77.

an agreement in 1985 not to compete lacks merit, since GUA contended that Southern had conducted a 1987 study which suggested that bypass *would be* profitable for Southern.[48]

Southern also takes issue with GUA's suggestions in its brief that the "take or pay" settlement with LDC customers is indicative of an unlawful agreement. According to Southern, actions which have been authorized by a regulatory agency are immune form antitrust liability. *Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1229 (N.D. Fla. 1991) ("private parties are shielded from antitrust immunity where their actions were regulated by a federal regulatory agency ... and the actions in question was authorized or directed by that regulatory agency."). Southern states that GUA's reliance on *Cantor*, *supra*, is misplaced since the issue in that case was state action, not federal antitrust immunity. Moreover, Southern contends that FERC's actions were not merely "rubber stamping" that would not permit antitrust immunity, (as GUA has contended), but rather was mandated by a District of Columbia ruling.[49]

Southern also disputes GUA's claims that conversations between Alagasco and Southern officials are indicative of a conspiracy. Supplier distributor communications cannot constitute evidence that tends to exclude the possibility of independent action unless there is (1) an initial complaint by the distributor; followed by

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48. GUA maintains that Southern had ignored the results of the study. However, Southern claims that it did not adopt GUA's characterization of the study as showing bypass would be profitable.

49. *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987) held that the regulatory scheme affecting interstate pipelines such as Southern's failed to take into account the issue of "take or pay" compensation.

corrective action by the supplier; and reassuring communication from the supplier that corrective action has been taken. *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520-1521 (11th Cir. 1988). Southern argues that GUA has presented no evidence that Alagasco complained to Southern. Nor is there evidence that Southern denied the taps in response to a complaint made by Alagasco. Finally, Southern claims that it never made a reassuring communication to Alagasco about the actions which it allegedly took.

Southern also argues that its refusal to deal with GUA cannot constitute a violation of Section 1, even if Southern denied GUA taps in response to Alagasco's request, because the companies acted with different goals. In support of this contention, Southern relies on *Garment Dist. v. Belk Stores Serv., Inc.*, 799 F.2d 905 (4th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988) (no anticompetitive agreement could be inferred where manufacturer and distributor pursued different goals).

With regard to its policy on direct connections, Southern asserts that it is undisputed that it acted unilaterally in denying the taps to GUA. Further, Southern maintains that GUA's arguments concerning the benefits to Gouthern of a Tuscaloosa Steel bypass are irrelevant. [50] Southern argues that Tuscaloosa Steel was only one of ten industrial end users that GUA sought to connect in the Tuscaloosa area and "the remote possibility of some incremental volume for Tuscaloosa Steel offered no reason for Southern to have evaluated its entire policy." Southern's Reply Brief at 23. In addition, Southern claims that it was concerned that

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50. As previously mentioned, GUA argues that Southern would have experienced an increase in volume as a result of a connection with Tuscaloosa Steel through GUA.

granting an additional bypass would result in its losing residential and commercial customers. Specifically, Southeren feared that if it allowed its industrial end users to bypass Alagasco it would have to spread its costs over a smaller customer base. Southern would then have to pass the increased costs onto its residential and commercial customers who might then turn to alternative sources of fuel. Southern also asserts that it did not wish to lose its share of the take or pay costs which its LDC's assumed. Southern also claims that it feared that it would be required to grant additional requests for industrial end users pursuant to FERC's antidiscrimination proceedings.

Southern states that its situation is analogous to that found in the case of *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438 (11th Cir. 1991). In that case, plaintiff accused a hospital of conspiring to suppress competition among radiologists using its radiology facilities. Todorov argued that the hospital's denial of privileges in the radiology department was contrary to its own interest in that it would not encourage competition among radiologists and result in lower prices for their services. The Eleventh Circuit held that the hospital could have had other justifications for suppressing competition by denying Todorov privileges, such as maintaining a better quality of service. Therefore, it affirmed summary judgment in favor of the defendants.

Lack of Anticompetitive Purpose:

Southern next turns to GUA's Section 2 Unilateral conduct claims. *United States v. Colgate*, 250 U.S. 300, 307 (1919) sets forth the applicable law in this area. In that case, the Court held, "In the absence of any purpose to create or maintain a monopoly, Section 2 does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own

independent discretion as to parties with whom he will deal." "Moreover, a monopolist's refusal to deal is actionable only where the refusal is designed to have an anticompetitive effect". *Mr. Furniture Warehouse, Inc. v. Barclays AM./Commercial Inc.*, 919 F.2d 1517, 1522 (11th Cir. 1990). Southern argues, therefore, that the Section 2 claim should fail since its actions did not have anticompetitive effect.

First, Southern argues that it did not compete with GUA, since GUA sought to solicit prospective customers of Alagasco, not customers of Southern. Merely because Southern had the capacity to compete with Alagasco for end users did not make Southern a competitor of GUA.[51] In this respect, Southern claims its situation is analogous to that found in *Official Airline Guides Inc. v. FTC*, 630 F.2d 920 (2nd Cir. 1980). In that case, a monopolist publisher of airline schedules refused to publish information pertaining to commuter airline connecting flights. The commuter airlines subsequently filed suit. Since the publisher did not compete with the commuter airlines, the court concluded that there was "no anticompetitive motive or intent with respect to the airline industry."[52]

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51. Southern had not directly connected a customer in Alagasco's service area for 21 years.

52. *Official Airlines Guides* discusses the case of *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In *Otter Tail* the Supreme Court addressed the refusal of a regulated industry to sell power wholesale or to transmit power purchased from other sources to municipalities which owned their own retail distribution systems. In holding that Otter Tail's refusal to sell or distribute violated Section 2, the Court observed that monopolizing the market of transmission was used to further a monopoly in the market of retail distribution. *Id.* at 377-379. GUA has not attempted to analogize its situation to that of the distributor in *Otter Tail*.

Second, Southern maintains that GUA has failed to demonstrate how Southern's refusal to allow new taps has maintained or created monopoly power.[53] Southern maintains that regardless of whether GUA was granted the taps it wished in the downstream intrastate distribution market, Southern's strength in the interstate transportation market remains unaffected.

Southern next takes issue with GUA's "essential facilities" argument.[54] Southern asserts that this claim should fail for the following reasons. First, as previously discussed, Southern claims that GUA cannot show that the denial of taps was capable of contributing to monopoly power. Second, GUA is not a competitor of Southern, Third, Southern maintains that it did not deny access to an essential facility to GUA since Southern was willing to ship all the gas which GUA required[55] - Southern only refused to construct new taps onto existing system facilities. In support of this contention, Southern refers to *City of Chanute v. Williams Natural Gas Co.*, Nos. 90-3273, 90-3313, 90-3369, 1992 WL 12682 (10th Cir. Jan. 30, 1992). In that case, certain cities brought an antitrust action against a pipeline company after the company terminated a program

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53. In its opposition, GUA has accused Southern of possessing a natural monopoly since it was the only interstate pipeline capable of servicing industrial end users in the market area.

54. To establish liability under the essential facilities doctrine, one must demonstrate (1) control of an essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; (4) the feasibility of providing the facility.

55. Southern makes this contention in a footnote on page 33 of its brief and in the December 6 1989 letter to Dan Tutcher from Mark Limbaugh.

whereby the cities could purchase gas from third party suppliers to be transported in the company pipeline. The Tenth Circuit found that there was no denial of access to essential facilities where the pipeline rejected plaintiff's proposed transaction but was willing to supply their full requirements of gas in a more expensive and more inconvenient manner.[56]

Finally, Southern argues that the tortious interference with business claim is also without merit since Southern has not undertaken any affirmative acts that could constitute tortious interference. Southern never contacted any of GUA's future customers. Since GUA has submitted nothing that indicates that Southern engaged in affirmative acts of interference, its tort claim should fail.

Alagasco:

Alagasco also contents that GUA's antitrust claims are meritless for the following reasons. First, Alagasco. like Southern maintains that GUA has presented no evidence of concerted action with Southern. Alagasco asserts that it merely reacted to Gua's attempts to woo Alagasco's industrial customers by contacting these customers, making clear its intention to compete on price, and lowering its transportation rates. [57]

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56. After reviewing *City of Chanute*, the court concludes that Southern's assertion that this is "directly on point" is overstated. In *City of Chanute*, defendant had granted plaintiffs access to the pipeline. Despite Southern's assertions to the contrary in its reply brief, none of the extensive materials submitted to the court indicates that GUA could have otherwise gained access to *Southern's pipeline*.

57. In footnote 4 to its reply brief, Alagasco states that GUA incorrectly stated that Alagasco rescinded its offer to lower Tuscaloosa Steel's transportation rates. Alagasco asserts that GUA was referring to

Furthermore, Alagasco argues that the evidence which GUA has submitted does not imply the existence of an illegal conspiracy with Southern. Alagasco initially discusses GUA's assertion that Alagasco has refused to take more gas from Transco in exchange for Southern's refusal to provide access to interstate pipelines. Alagasco maintains that it takes as much gas from Transco as it possibly can, Waren Deposition vol. 3, 37-39, and that GUA's *quid pro quo* theory is therefore specious.

Alagasco also disputes GUA's contentions that gas rates in Alabama are higher than in other states, despite the fact that Alabama has a supply of natural gas. According to Alagasco, the Alabama Public Service Commission regulates the rates for natural gas. Alagasco attributes the higher gas rates for industrial customers in Alabama to the policy decisions of the Public Service Commission.

Alagasco also claims that GUA's suggestion that it has a policy "not to compete" is untrue. Basically, Alagasco claims that it has proffered ample evidence of its efforts to compete. Its failure to solicit industrial customers under contract with a municipal gas system is not indicative of an unwillingness to compete.

Alagasco likewise claims that the "take or pay" and SURF negotiations are not indicative of a conspiracy. Concerning the "take or pay" agreements with hwereby Alagasco's and other LDCs' share of take or pay costs would be reduced proportionately if a bypass occurred, Alagasco maintains that there is no evidence that Southern and its LDC customers such as Alagasco ever discussed situations in which Southern would bypass its LDC customers. Alagasco

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a proposal to buy gas on Tuscaloosa Steel's behalf.

also argues that the load loss provisions in the long term service agreements[58] do not evince a conspiracy.

Alagasco next turns to the Section 2 claim. First, Alagasco reiterates that GUA has presented no evidence which would indicate that it conspired with Southern to deny GUA access to its taps. Second, Alagasco argues that GUA has failed to demonstrate a connection between the injuries which GUA asserts it has suffered and Alagasco's conduct.[59]

Finally, Alagasco addresses GUA's claim of tortious interference with business relations.[60] First, there is nothing which would suggest that Alagasco was involved in Southern's decision with regard to GUA. Therefore, GUA has failed to satisfy the elements of "intentional interference with the contract or business relations" and "damage to the plaintiff as the result of the interference". *Bridgeway Comm. Inc.*, *supra* 562 So.2d at 223 Second, GUA's accusations that Alagasco threatened and contacted its customers in response to GUA's initiative are unfounded for the following reasons. Alagasco maintains that it contacted *its* own customers in response to GUA's efforts to woo them from Alagasco and that such customer contacts are not actionable under Alabama law.[61] In terms of the alleged threats made

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58. Referred to as SURF negotiations.

59. *See Mr. Furniture*, *supra*, 919 F.2d at 1520 (holding that there must be a causal connection between the alleged antitrust violation and the antitrust injury for there to be antitrust standing).

60. The elements of this claim have been set previously set forth.

61. *See Public Systems Inc. v. Towry*, 587 So.2d 969-973-974 (Ala. 1991) (holding that contacting a competitor's customers does not constitute interference with business relations.)

to customers, Alagasco accuses GUA of "exaggerating." These "threats" to which GUA alludes refer to Alagasco's statements to two of its customers, Southern Resins and Tampko Asphalt, that it would remove the metering equipment or charge a standby charge should these customers utilize another gas supplier. T. J. Hawkins Deposition at 222-225.[62] Alagasco argues that this does not constitute a threat and is not actionable as a tort.

Alagasco next addresses GUA's claim that Alagasco interfered with GUA's dealings with Hunt Refining. First, Alagasco claims that Tutcher's testimony as to what an Alagasco employee had told him is hearsay that is not within any exception. Moreover, even if Tutcher's testimony in this regard is admissible, Alagasco argues that it cannot support a tortious interference claim.[63] Finally, Alagasco adopts Southern's arguments concerning GUA's unpreparedness, claiming that the company lacks standing.[64]

LEGAL CONCLUSIONS

As both plaintiff and defendants have acknowledged, whether or not GUA has standing as an antitrust plaintiff is

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62. Alagasco stated that it would be unfair for it to maintain its expensive metering equipment for a company which is not paying for it.

63. In its brief, Alagasco states that Tutcher testified in his deposition that Hunt Refining had consulted with Alagasco before deciding whether to allow GUA to "tie into" Hunt's facilities and that an Alagasco employee had informed him that the company was opposed to the idea.

64. After the foregoing was prepared, the court provided the parties with a copy. Each party acknowledged that the foregoing is a fair and complete statement of the undisputed facts, the argued facts, the issues which must be addressed by the court and the parties' contentions with respect thereto.

a threshold issue.[65] Therefore, the court will first address this question.

It is well established that a plaintiff which wishes to recover for an antitrust injury which arises from a frustrated attempt to enter a market must demonstrate (1) an intention to enter the business and (2) a showing of preparedness to enter the business. *Haynes v. Solomon*, 597 F.2d at 973.

Courts have evaluated the following factors in assessing a company's preparedness. These include: "the ability of the plaintiff to finance the business and to purchase the necessary facilities and equipment; the consummation of contracts by the plaintiff; affirmative actions by the plaintiff to enter the business and the background and experience of plaintiff in the prospective business." *Martin v. Phillips Petroleum Co.*, 365 F.2d at 633-34. The initial question before this court is whether, assuming that Southern had been willing to allow GUA access to its pipeline through the construction of new taps, GUA was *prepared* to enter the gas distribution market in Alabama.[66]

Plaintiff and defendants have different perceptions of plaintiff's preparation and ability to enter the market. Plaintiff claims that it was highly prepared while defendants

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65. The issue may be more one of sufficiency of evidence as to an essential element than "standing." Injury to business or property is an essential element. 15 U.S.C. § 15. *Jayco* does refer to a lack of "standing." 777 F.2d at 313.

66. While the evidence may be sufficient to establish "intention," the two requirements of intention and preparation are not entirely severable. Lack of true intention may be demonstrated by a lack of significant preparation. A lack of real intention may lead to a lack of preparation. In *Jayco*, the court said that the evidence of "intention" was weak, but sufficient. 777 F.2d at 314.

assert that GUA was inadequately prepared. Concerning the financial aspect of the business, the two principals of Texline, Mr. Holmes and Mr. Herbst, stated in their depositions that their company had financed every project which Mr. Tutcher had presented to it.[67] Mr. Herbst indicated that his companies had advanced funds to GUA to pay for Mr. Tutcher's office expenses and travel expenses. Herbst Deposition at 60. Neither Mr. Tutcher nor Mr. Levrier had indicated what amount GUA would need in capital from Texline. *Id.* at 65. GUA never presented Texline or either of its principals with a definite project which needed financing. *Id.* at 61. Mr. Herbst stated, however, that "in all probability" Texline would have financed GUA's project *had* Mr. Tutcher and Levrier *presented him with a project*. *Id.* Mr. Holmes also stated in his deposition that if GUA "had gotten a deal, we would have provided financing *if* it met our economic criteria, and I believe that if Dan Tutcher had submitted it to us it would have. (Emphasis added). Holmes Deposition at 42. Mr Holmes indicated that Texline would finance Mr. Levrier's share of GUA's business, although, according to Mr. Holmes, Mr. Levrier "didn't want any kind of commitment between us, so it was left open." Texline would purportedly have obtained the money for financing GUA from a bank.

The second factor in evaluating preparedness is the consummation of contracts by plaintiff. GUA points to purchase and sale agreements entered into with Tuscaloosa Steel and Gurney Industries. Defendants contend, however, that these sale agreements were illusory for the following reasons: (1) they contained broad *force majeure* type

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67. Mr. Herbst indicated in his deposition that Tutcher is obligated to present any venture undertaken by Midcoast Natural Gas, Tutcher's company, to Texline and Midcoast Transmission, another company with which Herbst is involved. Herbst Deposition at 53.

provisions; (2) neither contract became effective until the date of first delivery; (3) both were voidable upon adverse regulatory rulings; and (4) the Tuscaloosa Steel agreement contained no price term.[68]

A third element in determining if a company is prepared is whether plaintiff has taken affirmative actions to enter the market. Plaintiff claims that it performed market surveys, communicated with the Alabama Public Service Commission, commissioned maps and geographic surveys, made inquiries regarding the necessity of regulation by FERC, and made inquiries into costs and feasibility of pipeline connections. Defendants assert that these purported efforts are all insignificant, since GUA never obtained any right of ways or regulatory permits nor ever proceeded to lay pipe.

In *Martin v. Phillips Petroleum*, 365 F.2d 629 (5th Cir. 1966), the plaintiff claimed that defendants had violated the Sherman Act by taking over and replacing him in the acquisition of a gasoline plant which he hoped to buy. Martin had been granted a bus-option and hoped to purchase the plant with financing from a bank. Following negotiations, the bank informed Martin that his proposal was not acceptable to it and offered him participation in a revised deal whereby he would have received a three sixteenths interest in the deal. Martin never received alternative financing and subsequently commenced the antitrust suit. The Fifth Circuit held that Martin was unprepared to undertake the operation of a gas plant and thereby did not have antitrust injury. In reaching this result, the court held that Martin had proven no ability to finance the project, had

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68. Plaintiff has not addressed any of these contentions in its submissions to the court.

made no investment in facilities or equipment, and had no experience in the operation of a gas plant.

In *Hayes v. Solomon*, 597 F.2d 958 (5th Cir. 1979), plaintiffs accused defendants of conspiring to monopolize the motion picture exhibition business in Port Arthur, Texas. Plaintiffs had not sought to have architectural plans drawn up, although they had received a proposal from an architect which they had not responded to for several years. Plaintiffs had no commitments from tenants. Plaintiffs' own witness testified that financing would not be available without such commitments. Plaintiffs had worked with architects and construction engineers; however, this work had been performed in preparation for litigation. The court held that plaintiffs were unprepared and had failed to prove an essential element.[69]

In *Jayco Systems v. Savin Business Machines Corp.*, 777 F.2d 306 (11th Cir. 1985), plaintiff, an independent dealer of photocopiers, sued a manufacturer alleging antitrust violations. Plaintiff contended that it was prepared to expend its business and that Savin had frustrated this attempt through its failure to supply machines. In order to demonstrate that it was financially prepared to bid on the machines, Jayco submitted the affidavit of a former senior vice president of a bank. The bank employee examined the creditworthiness of Jayco as well as the profit history of the state contracts for which Jayco was bidding and stated that she would have

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69. *Hayes* refers to the requirements of intention, preparation *and capability*. *Id.* at 978. It also states: "The mere possibility of financing being available in the abstract is not enough. Showing that someone somehow could possibly obtain financing is not the same as showing that plaintiffs themselves were able and prepared to do so."

extended credit to Jayco.[70] The court held that this affidavit was not "significant evidence demonstrating the existence of a genuine fact issue regarding preparedness." *Jayco*, 777 F.2d at 315. The bank official had not considered the fact that the contracts did not guarantee the placement of copiers with state agencies. [71] In addition, her evaluation of company's credit history as "excellent" did not take into consideration Jayco's repayment history with Savin and

Canon which had been described as "good" and "generally satisfactory." Finally, nobody from Jayco had approached anyone about financing the purchase of the copying machines.

In *Cable Holdings v. Home Video, Inc.* 825 F.2d 1559 (11th Cir. 1987), the court considered the issue of an attempt by a cable company to expand its business into additional territories. In its appeal, plaintiff claimed that the jury was improperly instructed regarding the issue of preparedness. [72] The Eleventh Circuit stated that the special verdict was appropriate for the following reasons. First, plaintiff had not prepared cash flow estimates and financial statements to determine the profitability of its proposed expansion. Nor had plaintiff applied for permits or

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70. This base evidence was arguably more significant than that presented by plaintiff here. Here there is no evidence of a project feasibility consideration by any potential financial resource.

71. *Cf.* to plaintiff's "contracts" here.

72. Although the issue related to a jury instruction, the court extensively discussed the evidence, or lack thereof, of preparedness and held that "there was ample evidence to support the jury's special verdict which found that Cable Holdings was not prepared to enter the western territory." *Id.*, at 1561.

prepared design maps for the expansion. Finally, plaintiff had never sought FCC approval for the expansion.[73]

Professors Areeda and Hovenkamp have discussed the issue of fledgling companies which assert that a defendant's antitrust violations precluded them from entering business. Their treatise states, "Courts continue to be vexed by the plaintiff who clams he would have gone into business had the defendant's antitrust violation not kept him out. After all, cartels or dominant firms may undertake improperly exclusionary behavior designed to keep prospective entrants out of the market,[74] for such behavior may well be cheaper than doing battle after a new entrant is established. On the other hand, many exclusion claims seem tenuous at best, and most new businesses in the United States fail, most of them for reasons that have nothing to do with antitrust policy.

Aware of this policy dilemma, the courts have entertained claims of precluded entry, but not too readily. The plaintiff's intent to enter a market, standing alone, is seldom sufficient to confer standing. Ordinarily, he must show certain "sunk" or irreversible commitments, such as

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73. Note 4 of *Cable Holdings* emphasizes the significance of the "preparation" requirement. It states:

> Cable Holdings contends that the Cobb County Board of Commissioners' decision to grant them a franchise in the western territory conclusively proves that they were prepared to expand their business. We disagree. Permission to enter a business may well precede by many months or even years a business company's ability, financially and technically, to implement the franchise.

Id., at 1563

74. *See e.g.*, Salop, Strategic Entry Deterrence, 69 Am. Econ. Rev. 335 (1979).

plans prepared by a professional builder, loan commitments from financial institutions, contracts with prospective customers, or substantial expenditures for marketing or advertising. He must also be able to show damages that are cognizable under the antitrust laws. Lost profits will probably be too speculative, for the plaintiff has no earnings record. As an alternative, costs thus far invested in the project may be an appropriate measure of damage. Of course, if anticipated profits can be reasonably estimated, they may be recovered." Areeda & Hovenkamp *Antitrust Law* 340.2j.

The court initially notes that none of the aforementioned cases which deal with the issue of preparation present an factual scenario which is identical to the instant case. Unlike the plaintiffs in *Jayco*, who had not even inquired about financing, Tutcher and Levrier had discussed possible sources of funds. Unlike the *Hayes* plaintiffs, who had consulted with architects and prepared plans only in preparation for litigation, GUA purports to have performed market surveys and communicated with regulatory agencies for the purpose of advancing their business. Regardless of the timing, however, the preparation here was certainly no greater than that in *Cable Holdings*, *Hayes*, or *Jayco*. *Hayes* is particularly persuasive.

The court recognizes that Mr. Herbst and Mr. Holmes previously had worked with Mr. Tutcher and had financed several previous projects. Both apparently appreciated the quality of his endeavors. The court cannot question the respect which both principals of Texline held for Mr. Tutcher based upon past projects in which they had been involved with him. Nonetheless, these feelings of confidence in Tutcher's past endeavors cannot translate into the type of financial preparation that satisfies the *Hayes* standard. "The mere possibility of financing being available in the abstract

is not enough showing that someone somehow could possibly obtain financing is not the same as showing that plaintiffs themselves were able and prepared to." *Hayes*, 597 F.2d at 975. GUA did not provide Texline with information as to how much capital it would need to complete its project. Herbst Deposition at 47. In addition, Texline indicated that it planned to obtain financing for GUA's projects from banks. Texline, however, had not contacted any banks regarding financing for GUA's project. There was not the bare bones of information upon which anyone could assess the feasibility of a project. There was no discussion of the terms of any investment or loan; only financing in the "abstract." Therefore, the court concludes that GUA has not demonstrated the requisite financial preparedness to have suffered antitrust injury.

Other required factors of "preparation" are likewise deficient. There were no contracts as such. At best there were indications of interest if the price and other terms were right. There was certainly no "consummation" of contracts. There is no evidence of a plan whereby plaintiff could successfully undercut Alagasco's prices and have the financial ability to repay loans. There is no substantive evidence of what capital expenditures would be required. There is no substantial evidence of the likely cost of acquiring right of ways or other significant costs for consideration by proposed lenders or otherwise. All GUA did was to contact businesses which might advise them in these areas. *Cf.*, *Hayes*, 597 F.2d at 974. Plaintiff's "preparation" can best be styled as an idea coupled with a hope, plus some minimal investigation to explore potential, and some indication of interest from potential customers.[75] There is no substantial evidence of tangible preparation.

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75. It is axiomatic that customers will change *if* they can buy the same product cheaper.

There is no evidence that plaintiff's agents ever discussed any specific project or plan of financing. There was certainly no oral or written financial commitment; only a suggestion that the project would have been given strong consideration. The absence of contracts also has a bearing on the ability to finance. While the court does not hold that plaintiff had to lay pipelines after Southern rejected its requests, plaintiff cannot simply use Southern's denial to create an inference of antitrust injury to business or property. In *Jayco*, Judge Goldberg stated: "This rule denies recovery to those persons who, because the existence of their business was entirely speculative, could not have suffered injury in fact. While recognizing that the plaintiff need not show an injury to an ongoing business, the rule serves to protect defendants from multiplicative recoveries." *Id.*, at 313-14.

Even if plaintiff satisfies the preparation element, the Section 1 and 2 conspiracy claims are due to be denied for the following reasons. As all parties have acknowledged, a conspiracy can be proven by direct evidence or inferred from circumstantial evidence. *Kay Enterprises of Deleware, Inc. v. Venice Hosp.* 919 F.2d 1550, 1563 (11th Cir. 1990). Both defendants and plaintiff agree that GUA has not proffered any direct evidence of a conspiracy. Nor is the circumstantial evidence which GUA asserts can be used to infer a conspiracy sufficient to establish a conspiracy. With regard to the rate reductions which Alagasco made to certain industrial customers, GUA has failed to present any evidence which would indicate that it was a "sham" as it claims.[76]

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76. GUA had accused Alagasco of withdrawing its offer to lower rates to Tuscaloosa Steel after GUA had been denied the taps by Southern. However, an Alagasco official stated in his affidavit that Tuscaloosa Steel received a discount of 53%. Wright Affidavit.

GUA contends that defendants' agreement to dismiss proceedings filed against each other with the Alabama Public Service Commission was indicative of an agreement, since Alagasco never sought another tap from Transco and Southern never sought to directly connect any industrial customers. However, an Alagasco official testified that Alagasco is currently taking as much gas as it can from Transco. Warren Deposition, Vol. 3 at 37-39. In addition, Southern had not directly connected an industrial customer since the late seventies.

The principles set forth in *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575 (11th Cir. 1988) govern plaintiff's "conscious parallelism" claim.[77] The *Dunnivant* court held that a plaintiff must demonstrate that the decision not to deal was contrary to a defendant's economic business interest so as to raise an issue of good faith business judgment. *Id.* at 1583. In the instant case, defendant Southern has proffered sound business reasons for refusing to grant taps to GUA.[78] Moreover, GUA has offered nothing to refute Southern's justification.[79]

Finally, the court turns to GUA's allegations that the take or pay settlements which GUA had entered into with its

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77. Pursuant to this theory, GUA accuses Southern and Alagasco of parallel conduct which is suggestive of a conspiracy.

78. This evidence consists of testimony from employees and officers indicating that it would lose take or pay compensation if it bypassed its LDC customers.

79. As previously mentioned, GUA has asserted that Southern would have been able to transport additional gas to Tuscaloosa Steel, a potential GUA customer. However, Southern has indicated that the possibility of transporting additional volume of gas is only one consideration in determining whether to grant a bypass of an LDC customer.

local distribution companies indicated that Alagasco and Southern had entered into an agreement. The court initially notes that GUA has not attempted to explain how this settlement, which Southern entered into with all of its LDC customers, suggests a conspiracy. Furthermore, the take or pay settlement was approved by the Federal Energy Regulatory Commission. *See* 43 FERC 61,336, (1989). Courts have held that actions or agreements which are authorized by a regulatory agency acting pursuant to congressional authority are immune from antitrust liability. *Williams v. Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1229 (N.D. Fla. 1991).

Plaintiff has cited *Helicopter Support Systems v. Hughes Helicopter*, 818 F.2d 1530 (11th Cir. 1987). The case is clearly distinguishable. In that case, there was direct evidence of an agreement to fix re-sale prices in violation of the law (*Id.*, 1535-36), plus evidence of complaints, corrective action, requests to report future violations and an assurance that the manufacturer would similarly correct future violations. *Id.* at 1535. Here, there is only evidence of the natural contacts between a supplier and its customer. The *Hughes Helicopter* case merely concluded that there was a reasonable inference of a conspiracy created by the evidence in *that* case. In a case in which the plaintiff made a similar argument, *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, (11th Cir. 1988), the court distinguished the *Hughes* case and concluded that the plaintiff's proof did not exclude the possibility of independent actions. The evidence here (or lack thereof) is more similar to that in *Winn*. *See also Dunnivant v. Bi-State Auto Parts*, *supra*.

In *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1455 (11th Cir. 1991), the court stated that, "Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there

can be no liability under § 1 in the absence of an agreement." The court emphasized that "before analyzing the reasonableness of any alleged restraint on trade, courts must first ensure that an *agreement* to restrain trade exists." (Emphasis added). There is no substantial evidence of such an agreement here.[80]

Having determined that plaintiff's evidence does not support the inference of a conspiracy, the court next addresses plaintiff's monopoly and "essential facilities" claims against Southern. With regard to this contention, the court notes the case of *City of Chanute v. Williams Natural Gas Co.*, Nos. 90-3273, 90-3313, and 90-3369 WL 12682 (10th Cir., Jan. 30, 1992). In *Chanute*, eight municipalities sued a natural gas company alleging that the company had violated the Sherman Antitrust Act by terminating a temporary program whereby the cities could purchase gas from third party suppliers which Williams would transport over its pipeline. The Tenth Circuit found no violation and that plaintiffs had not met their burden of showing that no alternative to the facility existed.

In the instant case, defendant Southern claims that, although it had declined to allow GUA individual taps, the company had access to its pipeline. Specifically, Southern asserts that GUA could have negotiated with an LDC such as Alagasco or an industrial end user such as Hunt Refining to allow it to use one of its taps. Plaintiff has testified that it approached Hunt Refining about obtaining a tap and that

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80. In *Jayco*, Judge Goldberg stated, "Moreover, the party opposing summary judgment may not rely merely on the pleadings or even on conflicting testimony, but must introduce '*significant evidence* demonstrating the existence of a genuine fact issue.'" *Id.*, at 308. Plaintiff has not met its burden to prove a conspiracy or other illegal agreement.

Hunt refused. The record does not indicate whether GUA approached Alagasco or any other entity about obtaining taps. There is also evidence that Southern offered access other than in the form of individual taps. In the absence of any evidence that would indicate that GUA had no alternative to Southern's pipeline that was feasible, the court cannot find that plaintiff has made out a claim under the essential facilities doctrine. "As the word essential indicates, [the Cities] must show more than inconvenience or even some economic loss; [they] must show that an alternative to the facility is not available." *City of Chanute*, at 10. Even assuming that the evidence is sufficient to prove that Southern or Alagasco has a monopoly, there is no evidence that either used its power to enhance or maintain its position. *See Fulton v. Hecht*, 580 F.2d 1243 (5th Cir. 1978). There is no evidence that Southern's or Alagasco's purpose was to garner more market share or to accomplish any other anticompetitive end. *Mr. Furniture v. Barclays American/Commercial, Inc.*, 919 F.2d 1517 (11th Cir. 1990). On these facts, GUA has failed to meet this burden. Therefore, plaintiff's Section 2 claims are due to be dismissed.

Plaintiff's tortious interference claim also fails. In *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1583-84 (11th Cir. 1988), the court addressed a claim of tortious interference with business relationships. The court stated:

> Dunnivant also asserts a state tort claim against the appellee retailers. Dunnivant argues that under Alabama law the actions of the retailers caused tortious interference with his business relationships. In *Griese-Traylor Corp. v. First National Bank of Birmingham*, 572 F.2d 1039 (5th Cir. 1978), this court held that "in Alabama, a defendant will not be

> liable where it acted for legitimate economic reasons. Bona fide business competition is a justification for intentional interference with a competitor's business." *Griese*, 572 F.2d at 1045. In *Beasley-Bennett Electric Co. v. Gulf Coast Chapter of National Electrical Contractors Assn.*, 273 Ala. 32, 134 So.2d 427 (1961), the plaintiff advanced essentially the same claim Dunnivant now asserts. In *Beasley*, the plaintiff asserted unlawful interference with his business relations where defendant/contractors refused to do business with the plaintiff and told other construction companies that if they accepted bids from the plaintiff, the defendants would not give any bids to these companies in the future. The Alabama Supreme Court held that these allegations were insufficient. The court added that "[c]ompetition in business, even though carried to the extent of ruining a rival, constitutes justifiable interference in another's business relations, and is not actionable . . . ." *Beasley*, 134 So.2d at 429; *see, e.g.*, *Battles v. San Ann Service, Inc.*, 441 So.2d 925, 928 (Ala. Civ.App. 1983). In light of this authority, we are persuaded that Dunnivant cannot recover on his state tort claim.

Id., at 1583.

Here, there is no evidence that Alagasco took any action except to respond to possible competition. *Cf.*, *Bridgeway Communications, Inc.*, 562 So.2d 222 (Ala 1990). *See also Public Systems, Inc., Inc. v. Towry*, 587 So.2d 969 (Ala. 1991 and *Betts v. McDonald's Corp.*, 567 So.2d 1252 (Ala.

1990). Southern took no "affirmative" actions. Further, for the same reasons discussed with reference to the antitrust preparedness issue, there is no evidence of an injury caused by the defendants.[81]

An appropriate judgment will be entered.

This 12 day of August, 1992.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

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81. With regard to the "consummation of contracts" factor, it is not clear whether this refers to contracts with the plaintiff's customers or its suppliers. Here, there is neither.

APPENDIX B

GAS UTILITIES COMPANY OF
ALABAMA, INC., Plaintiff-Appellant,

Gas Utilities of Alabama, Inc., Plaintiff,
v.
SOUTHERN NATURAL GAS COMPANY,
Alabama Gas Corporation,
Defendants-Appellees.

No. 92-6790

United States Court of Appeals,
Eleventh Circuit.

July 27, 1993.

Natural gas distributor sued supplier, and another distributor with which supplier had contract, alleging restraint of trade and monopoly. The United States District Court for the Northern District of Alabama, No. CV91-PT-00445-S, Robert B. Propst, J., — F.Supp.—, entered judgment for defendants and appeal was taken. The Court of Appeals held that: (1) suing distributor was precluded from recovery due to failure to establish its readiness to enter relevant market, and (2) recusal of judge was not required.

Affirmed.

1. Monopolies 28(1.6)

Natural gas distributor was precluded from bringing antitrust suit claiming that supplier's contract with another distributor and its refusal to provide gas to suing distributor was a restraint of trade and monopoly practice, by

distributor's failure to demonstrate preparedness to enter market; distributor did not establish that it had in fact secured financing or consummated necessary contracts, and other steps such as communicating with licensing authority, investigating costs and feasibility, and inquiring regarding federal regulation and eminent domain rights, were preliminary in nature. Sherman Anti-Trust Act. §§ 1,2, 15 U.S.C.A. §§ 1, 2.

2. Judges 45

Judge was not required to recuse himself from antitrust suit brought by natural gas distributor against supplier and another distributor, on grounds that judge's relatives had proprietary interest in land leased to oil and gas interests, but not to companies involved in case; possibility that decision in case might have industry-wide application, and thus affect relatives' interest, was too speculative to require recusal.

Fritz Barnett, Julius Glickman, John R. Craddock, Glickman & Barnett, Houston, TX, for plaintiff-appellant.

George G. Lynn, Thomas W. Thagard, III, Maynard Cooper Frierson & Gayle, Birmingham, AL, John A. Donovan, Carl Alan Roth, Darrell J. Hieber, Marc N. Henschke, Darrel J. Hieber, Skadden Arps Slate Meacher & Flom, Los Angeles, CA, Joseph B. Mays, Jr., Philip J. Carroll, III, Bradley Arant Rose & White, Birmingham, AL, for plaintiff-appellant.

Appeal from the United States District Court for the Northern District of Alabama.

Before HATCHETT, Circuit Judge,
RONEY, Senior Circuit Judge, and
ATKINS *, Senior District Judge.

PER CURIAM:

Gas Utilities of Alabama, a natural gas distributor, brought this antitrust action against Southern Natural Gas Corporation ("Southern"), which operates an interstate natural gas pipeline, and Alabama Gas Company ("Alagasco"), a local distribution company that purchases from Southern and distributes gas to customers in Alabama. Southern provides gas to end users both directly and through local distributors. Alagasco is Southern's only distribution company in the area.

Interested in providing gas in the market to which Southern and Alagasco provide gas, Gas Utilities requested a tap. Southern denied the request. Gas Utilities brought this action alleging violations of §§ 1 and 2 of the Sherman Act, and a state claim of tortious interference with business relationships. The district court granted Southern and Alagasco summary judgment. Gas Utilities appealed. We affirm.

[1] The comprehensive opinion of the district court, which answers almost every question that is repeated on this appeal, makes it unnecessary to set forth in detail the reasons why summary judgment for defendants was properly entered in this case. *Gas Utilities Co. of Ala, Inc. v. Southern Natural Gas Co.*, No. CV-91-pt-00445-S — F.Supp. — (N.D.Ala. Aug. 12, 1992).

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Gas Utilities argued that material issues of fact exist as to: (1) existence of a contract in restraint of trade between Alagasco and Southern; (2) price control and exclusion of competition by Alagasco and Southern; (3) Gas Utilities' status as an actual and potential competitor; (4) tortious interference by Alagasco and Southern; and (5) Gas Utilities' preparedness to enter the market.

The most significant issue turns on whether Gas Utilities came forth with enough evidence to show it was prepared to enter the market. The law clearly requires a showing of an intention and preparedness to enter the business to give a plaintiff a cause of action for being foreclosed from the market. *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987). Gas Utilities failed to demonstrate that it was prepared to enter the market. Viewing the summary judgment evidence most strongly in favor of the plaintiff, *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), it did not establish that Gas Utilities had *secured* financing or *consummated* its contracts. "The mere possibility of financing being available in the abstract is not enough. Showing that someone somehow could possibly obtain financing is not the same as showing that plaintiffs themselves were able and prepared to." *Hayes v. Solomon*, 597 F.2d 958, 975 (5th Cir. 1979). Likewise, showing that someone may be interested in entering into a contract if the price is right is not the same as having an enforceable contract. Gas Utilities' other activities were merely preliminary steps taken in anticipation of preparing to enter the market such as communication with the licensing authority, investigation of costs and feasibility, and inquiry regarding FERC regulation and eminent domain right.

Inquiry into procedures is insufficient to establish preparedness. The party must take some affirmative step to enter the business. *Hayes*, 597 F.2d at 973.

[2] The only other issue which deserves some comment here is whether the trial judge should have recused himself from this case. The trial judge's wife and father-in-law have proprietary interests in land leased to oil and gas interests but not to companies involved in the present action. The question is whether the alleged potential industry-wide impact of this case might so affect their interests as to require recusal. The Fifth Circuit rejected this theory in *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986). In that case, petitioners brought suit against twenty-three banks that made loans to petitioners. Petitioners argued that a ruling adverse to the banks would have an industry-wide impact and that the judge should have recused himself because he held an investment in an investment bank. The *Placid* court stated that it was "unwilling to adopt a rule requiring recusal in every case in which a judge owns stock of a company in the same industry as one of the parties to the case." *Placid*, 802 F.2d at 786. The court felt that because petitioners showed "only an indirect and speculative interest," recusal was not justified. The court concluded that "[a] remote, contingent, and speculative interest is not a financial interest within the meaning of the recusal statute ... nor does it create a situation in which a judge's impartiality might reasonably be questioned." We agree with the reasoning of that case. The plaintiffs have not alleged how the outcome of this case could even speculatively affect the interests of the judge's relatives. The district judge was not shown to be disqualified from hearing this case.

We have closely examined all other arguments that raise as error every issue that the district court decided and

find the arguments to be without merit for the reasons set forth in that opinion.

AFFIRMED.

I

AMICA MUTUAL INSURANCE COMPANY, Plaintiff-Counter-defendant, Appellee,

v.

Leo P. BOURGAULT, Cheryl Bourgault, Defendants-Counter-claimants, Apellants.

No. 92-8068.

United States Court of Appeals,
Eleventh Circuit.

July 27, 1993.

Ervin H. Gerson, Stevens & Gerson, Atlanta, GA, for defendants-counter-claimants, appellants.

Alan Terry Sorrells, Carter & Ansley, Christopher N. Shuman, Atlanta, GA, for plaintiff-counter-defendant, appellee.

Appeal from the United States District Court for the Northern District of Georgia.
(No. 1:90-CV-1606-JOF), J. Owen Forrester, District Judge.

Before TJOFLAT, Chief Judge,
HATCHETT and BIRCH, Circuit Judges.

APPENDIX C

GAS PURCHASE AND SALES AGREEMENT

This agreement (the "Agreement" or "Contract") is made and entered into this 21st day of November, 1989 by and between Gas Utilities Of Alabama, Inc. as "Seller" and Gurney Industries, Inc. as "Buyer."

Facility: **Gurney Industries' Prattville Plant, 242 South Court Street, Prattville, Alabama**

Buyer desires to purchase from Seller a supply of natural gas to be used in and for the operation of Buyer's facility listed above (the "Facility"), and Seller desires to sell a supply of natural gas which is available for sale to Buyer for said purpose. Unless otherwise provided, any notice, request, demand, statement or bill shall be in writing and addressed to the above stated parties as hereinafter provided. Therefore, in consideration of the premises and of the mutual covenants herein contained, the parties agree to the following.

1. Term

This Agreement shall be in full force and effect beginning with the date of the first delivery, which in no event will be later than March 31, 1990 and continuing for a period fo five (5) years. This Agreement shall continue year-to-year thereafter unless canceled at any time after the initial term by written notice of the terminating party delivered thirty(30) days prior to an anniversary date to the other party, such cancellation to take effect at 7:00 a.m. LT on the first day of the next succeeding month following the calendar month in which the thirtieth (30th) day after notice falls. Seller shall have the right of first refusal to meet all

competing gas supply offers available to Buyer after the initial term of this Contract. If Seller meets the terms of a competing offer, Buyer shall continue to honor this Contract subject to the new terms (those of the competing offer accepted by Seller). If Seller refuses to or is unable to meet their terms of the competing offer, then Buyer shall for the term thereof be released from further obligations hereunder.

2. Contract Volume

Seller shall during the term of this Agreement provide Buyer with one hundred percent (100%) of Buyer's gas requirements up to a maximum of 1,000 MMBtu per day and 50 MMBtu per hour at the Facility. However, Seller retains the option to supply any additional customer requirements over and above the maximums set forth above at this location for the term of this Contract.

3. Price

The Southern Natural Gas Co. Index (as published in "Inside F.E.R.C.'s Gas Market Report") for Louisiana, plus the Southern Natural Gas Co. Zone 2 (Alabama) transportation rate, plus $.5800/MMBtu

4. Rates and Requirements

Buyers agrees to be bound by, and this Agreement is subject to, Southern Natural Gas Company rates and requirements, effective as of the date first written above or as subsequently amended.

5. Point of Delivery, Facilities, Pressure, Ownership and Control

Gas shall be delivered by Seller to Seller's meter (the "Point of Delivery") on Buyer's property at the Facility listed above in the State of Alabama at such pressure as may be necessary to effect, delivery into Buyer's pipeline, but not in excess of the then current operating pressure at such point on Seller's system. During the term of this Contract, Buyer shall furnish to Seller, at Buyer's expense, a suitable site on Buyer's property, together with the right of ingress and egress, to be used by Seller for measuring and/or other equipment, for the purpose of supply, operation and maintenance. Title to all gas sold and delivered hereunder shall pass from Seller to Buyer at Point of Delivery.

6. Quality of Gas

Gas delivered will meet Southern Natural Gas Company standard gas pipeline specifications unless otherwise notified. (Specification will be provided is requested).

7. Measurement and Tests

Except as may otherwise specifically be required by law or as otherwise provided herein, the measurement and testing of the gas delivered and received hereunder shall be in accordance with the measurement and metering standards set forth by Southern Natural Gas Company. The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature base of sixty degrees Fahrenheit (60°F) and at a pressure base of fourteen and sixty-five one-hundredths (14.65) pounds per square inch absolute. It is recognized that Seller shall install, own, operate and maintain standard type measuring and testing equipment necessary to measure the gas delivered and received hereunder and shall keep the same accurate and in repair. Readings, calibrations, tests, repairs and adjustments of said equipment, and

changing of charts, shall be done by employees or agents of Seller's and in accordance with good engineering practice as often as found necessary in actual operation. Buyer shall have access to Seller's measuring and testing equipment, including recording calorimeters at any reasonable time, and shall have the right to have a representative present at tests, calibrations and adjustments thereof.

Buyer may install, operate and maintain measurement equipment at Buyer's own cost, risk and expense, but in the same manner as is required for Seller's equipment of standard type, provided that the same does not interfere with the operation of Seller's equipment.

The gross heating value of the gas shall be determined by Seller's tests made by taking samples of the gas at such times as may be designated by Seller, but at least once each month, and having the British Thermal Unit (BTU) content per cubic foot shall be determined at a temperature base of sixty degrees Fahrenheit (60°F), when adjusted to a dry basis and a pressure of fourteen and sixty-five one-hundredths (14.65) psia. Gross hearing value should be on a real basis in accordance with GPA, AGA, or other industry acceptable calculations with any amendments or revisions to which the parties mutually agree. Chart integration and volume computations shall be made by Seller as accurately as possible and within the accuracy prescribed by the manufacturer of the computing equipment used.

If at any time the measuring or testing equipment is found to be out of service or registering inaccurately, it shall be adjusted at once to read accurately within the limits prescribed by the manufacturer. If such equipment is out of service or inaccurate by an amount exceeding three percent (3%) at a reading corresponding to the average rate of flow for the period since the last preceding test, the previous

readings of such equipment shall be disregarded for any period definitely known or agreed upon, or is none exists, for a period of sixteen (16) days or one-half of the elapsed time since the last test, whichever is shorter. The volumes of gas delivered during such period shall be estimated (i) by using the data recorded by any check measuring equipment if installed and accurately registering, or if not (ii) by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation, or if neither (i) or (ii), (iii) by estimating the quantity or quality delivered, based upon deliveries under similar conditions during a period when the equipment was registering accurately. No correction shall be made for recorded inaccuracies of three percent (3%) or less. Buyer and Seller shall have the right to inspect equipment installed or furnished and the charts and other measurement of testing data at all times during business hours; but the reading, calibration and adjustment of such equipment and changing of chart shall be done only by the party installing and furnishing the same.

8. Regulatory Bodies

This Agreement shall be subject to all valid state and federal laws and orders, directives, rules and regulations of any governmental body or official having jurisdiction. If any administrative agency or legislative body issues a ruling which significantly alters the reasonable expectations of either party such party shall have the right to open negotiations for revision of this Contract. If Buyer and Seller have not agreed on such revision within thirty (30) days after the opening negotiations, then either party may cancel this Contract, upon giving forty-five (45) days' written notice with such cancellation to take effect at 7:00 a.m. LT on the first day of the next succeeding calendar month

following the calendar month in which the forty-fifth (45th) day after notice falls.

Seller has informed Buyer and Buyer understands that Seller is not a public utility

9. Billing and Payment

Seller shall render to Buyer on or before the fifteenth (15th) day of each calendar month a billing for all gas purchased during the preceding month according to the measurements, computations, and prices herein provided. Buyer agrees to make payment hereunder to Seller for its account at the address indicated on the monthly billing, or such other address as Seller may from time to time designate in writing to Buyer, within ten (10) days of the date of the receipt of Seller's billing. If the correct amount is not paid when due, interest on any unpaid amount shall accrue at the then current prime rate of interest (Chase Manhattan, N.A.). If such default continues thirty (30) days after written notice from Seller to Buyer, Seller may suspend gas deliveries hereunder without prejudice to other remedies. Payment of any invoices shall not preclude subsequent adjustment due to faulty or defective measuring and/or testing devices or inaccurate chart integration and/or volume computations made by Seller, or its designee. Seller's sales of gas to Buyer at any time during the term of this Agreement shall be subject to Seller's credit policies at the time of the sale which policies may be amended from time to time during the term of this Agreement without prior notice. Seller retains the right to review Buyer's credit worthiness at any time and from time to time during the term hereof. Further, Seller may require the posting of an irrevocable letter of credit in an amount specified and in a form approved by Seller to be posted at a bank or other financial institution acceptable to

seller in order for Seller to begin delivery of gas to Buyer hereunder or to continue to deliver gas to Buyer hereunder.

10. Taxes

All taxes due as a result of the transportation, distribution, sale, franchise, or other disposition of gas by Seller, before the same passes the Point of Delivery hereunder, shall be and remain the obligations of Seller; and Buyer shall pay and be responsible for any and all taxes or charges after the point of delivery.

11. Warranty of Title

Seller expressly warrants title to and right to sell all gas delivered by it hereunder and warrants that said gas is being sold and delivered in accordance with all applicable state and federal laws, and the orders, directives, rules and regulations of any governmental body or official having jurisdiction.

12. Force Majeure

If any party is rendered unable, wholly or in part, by force majeure or other cause herein specified, to carry out its obligations under this Contract, then upon such party's giving notice and full particulars of such force majeure in writing or by telegraph to the other party within a reasonable time after the occurrence of the cause, this Contract shall not terminate and the obligations of the party giving such notice, so far as they are affected by such force majeure or other causes herein specified, shall be suspended during and only during the continuance of such causes, and such cause shall be remedied so far as possible with all reasonable dispatch. The term "force majeure" as employed herein means acts of God; acts of governmental bodies regulating Buyer and/or Seller,

the failure of such governmental bodies to act and/or delays in actions by such governmental bodies; strikes, lockouts or other industrial disturbances; acts of the public enemy; wars, blockades; insurrections; riots; epidemics; landslides; lightning; earthquakes; fires; storms; floods; washouts; arrests and restraints of the government, either federal or state, civil or military; civil disturbances; explosions; breakage; breakdown or accident to machinery, equipment or lines of pipe; freezing of wells or lines of pipe; partial or entire failure of natural gas wells or gas supply; depletion of gas reserves; the partial or entire curtailment of flow by interstate or intrastate pipelines; the necessity or desirability of repairing, altering, maintaining, inspecting, replacing, changing the size of, substituting or removing machinery, equipment, pipelines or appurtenant facilities; and any other causes not reasonable within the control of the party claiming suspension, and through due diligence such party is unable, wholly or in part, to prevent or overcome. Such term likewise includes (i) those instances where either party is required to obtain servitude, right-of-way grants, permits, new delivery point(s) under existing tariffs or other means, exceptions or licenses to enable it to fulfill its obligations, and after exercising reasonable diligence and cost the party is unable to acquire or is delayed in acquiring the aforementioned requirements, and (ii) in those instances where either party is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permission from any governmental agency (federal, state or municipal, civil or military) to enable such party to fulfill its obligations, and after exercising reasonable diligence and cost, the party is unable to acquire or is delayed in acquiring said requirements. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty and the above requirement that any force majeure shall be remedied with all reasonable

dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposition when such course in inadvisable in the discretion of the party having the difficulty. The provisions of this clause shall not apply to the obligations to make payments of monetary amounts due pursuant to the terms of Section 9 hereof.

13. Descriptive Headings

The descriptive headings contained herein are for convenience only and shall not control or affect the meaning of construction of any provision of this Agreement.

14. Assignment

Buyer shall not sell, assign or convey this Contract or any interest herein or any part thereof without the prior written consent of Seller which consent shall not be unreasonably withheld.

15. Waiver of Breach

The waiver by the parties of a breach by any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any of the parties hereto. Further, no course of dealing between the parties nor any delay in exercising any rights hereunder shall operate as a waiver of any rights of the parties hereto.

16. Governing Law

This Agreement shall be governed and construed in accordance with the laws of the State of Alabama.

17. Binding Effect

This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors, assigns and legal representatives.

18. Amendment

This Agreement may be amended from time to time or terminated by an instrument in writing signed by each of the parties to this Agreement.

19. Entire Agreement

This Agreement shall comprise the entire agreement between the parties hereto and hereby supersedes, replaces and revokes any and all understandings or agreement, whether written or oral, between the parties hereto. No variation or modification hereof shall be deemed valid unless contained in writing with like formality signed by each of the parties hereto, which writing shall make express reference to this Agreement.

20. Savings Clause

The parties intend this Agreement to be valid and enforced as written. However, if any provision, or any part thereof, is held to be invalid, illegal or unenforceable for any reason, the parties hereto agree that the court making such determination shall have the power to amend any provision in order to make such provision enforceable to the fullest extent permitted by law, and in its amended form, such provision shall then be enforceable and be enforced.

21. Additional Documents

The parties hereto hereby agree to execute any and all such further documents to effectuate the purposes and transactions contemplated herein.

22. Remedies

Each party hereto acknowledges that a remedy at law for any breach or attempted breach of this Agreement will be inadequate, agrees that each other party hereto shall be entitled to specific performance and injunctive and other equitable relief in case of any such breach or attempted breach, and further agrees to waive any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief.

23. Notices

All notices provided for by this Agreement shall be in writing. In the event a notice or other document is required to be sent hereunder, such notice or other document shall be deemed given if such notice or other document is either (i) delivered personally or (ii) sent by registered or certified mail to the party entitled to receive such notice or other document at the respective addresses for Buyer and Seller set forth below. Any party may change their address by filing notice of the change with the other party.

SELLER

Gas Utilities Of Alabama, Inc.
510 Bering Drive, Suite 300
Houston, Texas 77057

BUYER

Gurney Industries, Inc.
2423 South Court Street
Prattville, Alabama 36067

24. Definitions

The terms shown below as used in this Agreement shall have the following meanings:

(a) The term "*gas*" shall include casinghead gas, natural gas from gas wells, and residue gas resulting from processing casinghead gas and gas well gas.

(b) The term "*day*" shall mean the twenty-four (24) hour period commencing at 7:00 a.m. local time (hereinafter referred to as LT) on one calendar day and ending at 7:00 a.m. LT on the following calendar day.

(c) The term "*month*" shall mean the period beginning at 7:00 a.m. LT on the first day of a calendar month and ending at 7:00 a.m. LT on the first day of the next succeeding calendar month.

(d) The term "*Year*" shall mean any period of three hundred and sixty-five (365) consecutive days during the life of this Contract beginning at 7:00 a.m. LT on date of first delivery and any anniversary of such day during the term hereof.

(e) The term "*MMBtu*" shall be determined by multiplying the total MCF delivered, expressed in cubic feet at a temperature of sixty degrees Fahrenheit (60°F) and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute, times the gas heating value expressed in British Thermal Units per cubic foot of gas when adjusted to a dry basis at a temperature of sixty degrees Fahrenheit (60°F) and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute.

(f) The term "*MMBtu*" shall mean one million (1,000,000) Btus.

(g) The term "*MCF*" shall mean one thousand (1,000) cubic feet.

(h) The terms "*British Thermal Unit*" and "*BTU*" shall mean one (1) BTU and is defined as the quantity of heat required to raise the temperature of one (1) avoirdupois pound of pure water from fifty-eight and five-tenths (58.5) degrees F to fifty-nine and five-tenths (59.5) degrees F at a constant pressure of fourteen and sixty-five hundredths (14.65) psia.

The terms and conditions of this Agreement are valid only if accepted by Buyer on or before November 22, 1989.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed in several counterparts, each of which shall be deemed an original.

SELLER

Gas Utilities of Alabama, Inc.

By: /s/ illegible

WITNESS:

/s/ Gale Lyles
Date: 11-21-89

BUYER

Gurney Industries, Inc.

By: /s/ illegible

WITNESS:

/s/ illegible
Date: 11-20-89

AGREEMENT

BY AND BETWEEN

TUSCALOOSA STEEL CORPORATION
(BUYER)

AND

GAS UTILITIES OF ALABAMA, INC.
(SELLER)

FOR

NATURAL GAS SUPPLY TO:

TUSCALOODA STEEL CORPORATION
1700 Holt Road
Tuscaloosa, Alabama 35404

Subject to acceptance by: *December 15, 1989*

DEFENDANT'S
EXHIBIT
126

AGREEMENT

This agreement (the "Agreement" or "Contract") is made and entered into by and between Gas Utilities Of Alabama, Inc. as "Seller" and Tuscaloosa Steel Corporation as "Buyer" effective the date all of the undersigned parties have affixed their name hereto (the "Effective Date").

Facility: Tuscaloosa Steel's Plant, 1700 Holt Road, Tuscaloosa, Alabama

Buyer desires to acquire a new supply of natural gas to be used in and for the operation of Buyer's facility listed above (the "Facility"), and Seller desires to sell a supply of natural gas which is available for sale to Buyer for said purpose. Unless otherwise provided, any notice, request, demand, statement or bill shall be in writing and addressed to the above stated parties as hereinafter provided. Therefore, in consideration of the preemies and of the mutual covenants herein contained, the parties agree to the following.

1. Agreement Overview

Seller shall during the term hereof review Buyer's gas supply contract(s) for the above named Facility and assist Buyer in its negotiation of new or replacement contract(s) which may include Seller's preparation of one or more proposals to Buyer for new sources of gas supply. Seller shall further be responsible for nominations, balancing and any other transportation related services necessary to effect gas service to Buyer's Facility. Seller's proposal(s) may

include a discussion and/or analysis of the following items relating to new sources of gas supply (i) the construction of one or more alternative pipeline(s), (ii) terms under which such new sources of supply can or should be obtained and (iii) other options.

The terms and conditions of this Agreement are valid only if accepted by Buyer on or before the close of business on Friday, December 15, 1989.

This Agreement shall be in full force and effect beginning with the date of first delivery, which in no event will be later than June 30, 1990 and continuing for a 3, 4 or 5-year period as discussed below under "Price". The parties recognize that Buyer's current contract expires by the end of the first quarter of 1990 and Seller has until june 30, 1990 in which to begin the delivery of gas hereunder. Therefore, Seller has covenanted to provide Buyer with the services described above during the interim period (expiration of the current contract to June 30, 1990 or first delivery of gas) to the extent required by Buyer.

Should Seller and Buyer fail to agree on the Price, as defined below, on or before the close of business on January 15, 1990, this Agreement shall automatically terminate unless the parties prior to that time mutually agree in writing to an extension.

Seller has the continuing first right to supply gas to Buyer during the term hereof under mutually agreeable terms whenever Buyer elects not to continue with its then current supplier(s).

Information supplied to Buyer by Seller pursuant to this Agreement, including, but not limited to, the Price, as defined below, is confidential and proprietary and Buyer

covenants neither (i) to divulge such information to third parties directly or indirectly nor (ii) to utilize or attempt to utilize such information to obtain an equal, improved, or more advantageous, contract for gas supply from third parties including Buyer's current supplier(s) without Seller's prior written permission whether or not any such contract for gas supply is ultimately determined to be equal, improved or more advantageous.

2. Term

This Agreement shall be in full force and effect beginning with the date of first delivery, which in no event will be later than June 30, 1990 and continuing for a period as discussed below under "Price". This Agreement shall continue year-to-year thereafter unless canceled at any time after the initial term by written notice of the terminating party delivered thirty (30) days prior to an anniversary date to the other party, such cancellation to take effect at 7:00 a.m. LT on the first day of the next succeeding month following the calendar month in which the thirtieth (30th) day after notice falls. However, should Seller and Buyer fail to agree on the Price, as defined below, on or before the close of business on January 15, 1990, this Agreement shall automatically terminate unless prior to that time the parties mutually agree in writing to an extension. Seller shall have the right of first refusal to meet all competing gas supply offers available to Buyer after the initial term of this Contract. If Seller meets the terms of a competing offer, Buyer shall continue to honor this Contract subject to the new terms (those of the competing offer accepted by Seller). If Seller refuses to or is unable to meet the terms of the competing offer, then Buyer shall for the term thereof be released from further obligations hereunder.

BEST AVAILABLE COPY

3. Contract Volume

Seller shall during the term of this Agreement provide Buyer with one hundred percent (100%) of Buyer's gas requirements up to a maximum of 3,500 MMBtu per day and 200 MMBtu per hour at the Facility. However, Seller retains the option to supply any additional customer requirements over and above the maximums set forth above at this location for the term of this Contract.

4. Price

The price (the "Price") per MMBtu which will hereafter be agreed to in writing by the parties and attached as Addendum No. 1 to this Agreement. Such Price shall be based on either a 3, 4 or 5-year term for this Agreement which period shall be elected by the parties and designated on such addendum.

5. Rates and Requirements

Buyer agrees to be bound by, and this Agreement is subject to, either Southern Natural Gas Company's or Magnolia Pipeline Corporation's rates and requirements, whichever are applicable, as may be elected from time to time by Seller as of the Effective Date or as subsequently amended.

6. Point of Delivery, Facilities, Pressure, Ownership and Control

Gas shall be delivered by Seller to Seller's meter (the "Point of Delivery") on Buyer's property at the Facility listed above in the State of Alabama at such pressure as may be necessary to effect delivery into Buyer's pipeline, but not in excess of the then current operating pressure at such point on

Seller's system. During the term of this Contract, Buyer shall furnish to Seller, at Buyer's expense, a suitable site on Buyer's property, together with the right of ingress and egress, to be used by Seller for measuring and/or other equipment, for the purpose of supply, operation and maintenance. Title to all gas sold and delivered hereunder shall pass from Seller to Buyer at Point of Delivery.

7. Quality of Gas

Gas delivered will meet Southern Natural Gas Company's or Magnolia Pipeline Corporation's standard gas pipeline specifications, whichever are applicable, unless otherwise notified. (Specification will be provided if requested).

8. Measurement and Tests

Except as may otherwise specifically be required by law or as otherwise provided herein, the measurement and testing of the gas delivered and received hereunder shall be in accordance with the measurement and metering standards set forth by Southern Natural Gas Company or Magnolia Pipeline Corporation, whichever are applicable. The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature base of sixty degrees Fahrenheit (60°F) and at a pressure base of fourteen and sixty-five one-hundredths (14.65) pounds per square inch absolute. It is recognized that Seller shall install, own, operate and maintain standard type measuring and testing equipment necessary to measure the gas delivered and received hereunder and shall keep the same accurate and in repair. Readings, calibrations, tests, repairs and adjustments of said equipment, and changing of charts, shall be done by employees or agents of Seller's and in accordance with good engineering practice as often as found necessary in actual operation. Buyer shall

have access to Seller's measuring and testing equipment, including recording calorimeters at any reasonable time, and shall have the right to have a representative present at tests, calibrations and adjustments thereof.

Buyer may install, operate and maintain measurement equipment, at Buyer's own cost, risk and expense, but in the same manner as is required for Seller's equipment of standard type, provided that the same does not interfere with the operation of Seller's equipment.

The gross heating value of the gas shall be determined by Seller's tests made by taking samples of the gas at such times as may be designated by Seller, but at least once each month, and having the British Thermal Unit (BTU) content per cubic foot shall be determined at a temperature base of sixty degrees Fahrenheit (60°F), when adjusted to a dry basis and a pressure of fourteen and sixty-five one-hundredths (14.65) psia. Gross heating value should be on a real basis in accordance with GPA, AGA, or other industry acceptable calculations with any amendments or revisions to which the parties mutually agree. Chart integration and volume computations shall be made by Seller as accurately as possible and within the accuracy prescribed by the manufacturer of the computing equipment used.

If at any time the measuring or testing equipment is found to be out of service or registering inaccurately, it shall be adjusted at once to read accurately within the limits prescribed by the manufacturer. If such equipment is out of service or inaccurate by an amount exceeding three percent (3%) at a reading corresponding to the average rate of flow for the period since the last preceding test, the previous readings of such equipment shall be disregarded for any period definitely known or agreed upon, or if none exists, for a period of sixteen (16) days or one-half of the elapsed time

since the last test, whichever is shorter. The volumes of gas delivered during such period shall be estimated (i) by using the data recorded by any check measuring equipment if installed and accurately registering, or if not (ii) by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation, or if neither (i) or (ii), (iii) by estimating the quantity or quality delivered, based upon deliveries under similar conditions during a period when the equipment was registering accurately. No correction shall be made for recorded inaccuracies of three percent (3%) or less. Buyer and Seller shall have the right to inspect equipment installed or furnished and the charts and other measurement of testing data at all times during business hours; but the reading, calibration and adjustment of such equipment and changing of chart shall be done only by the party installing and furnishing the same.

9. Regulatory Bodies

This Agreement shall be subject to all valid state and federal laws and orders, directives, rules and regulations of any governmental body or official having jurisdiction. If any administrative agency or legislative body issues a ruling which significantly alters the reasonable expectations of either party such party shall have the right to open negotiations for revision of this Contract. If Buyer and Seller have not agreed on such revision within thirty (30) days after the opening negotiations, then either party may cancel this Contract, upon giving forty-five (45) days' written notice with such cancellation to take effect at 7:00 a.m. LT on the first day of the next succeeding calendar month following the calendar month in which the forty-fifth (45th) day after notice falls.

Seller has informed Buyer and Buyer understands that Seller is not a public utility.

10. Billing and Payment

Seller shall render to Buyer on or before the fifteenth (15th day of each calendar month a billing for all gas purchased during the preceding month according to the measurements, computation,s and prices herein provided. Buyer agrees to make payment hereunder to Seller for its account at the address indicated on the monthly billing, or such other address as Seller may from time to time designate in writing to Buyer, within ten (10) days of the date of the receipt of Seller's billing. If the correct amount is not paid when due, interest on any unpaid amount shall accrue at the then current prime rate of interest (Chase Manhattan, N.A.). If such default continues thirty (30) days after written notice from Seller to Buyer , Seller may suspend gas delivered hereunder without prejudice to other remedies. Payment of any invoices shall not preclude subsequent adjustments due to faulty or defective measuring and/or testing devices of inaccurate chart integration and/or volume computations made by Seller, or its designee. Seller's sales of gas to Buyer at any time during the term of this Agreement shall be subject to Seller's credit policies at the time of the sale which policies may be amended from time to time during the term of this Agreement without prior notice. Seller retains the right to review Buyer's credit worthiness at any time and from time to time during the term hereof. Buyer shall comply with Seller's reasonable requests for information and documentation regarding Buyer's credit worthiness. Further, Seller may require the posting of an irrevocable letter of credit in an amount specified and in a form approved by Seller to be posted at a bank or other financial institution acceptable to Seller in order for Seller to begin delivery of

gas to Buyer hereunder or to continue to deliver gas to Buyer hereunder.

11. Taxes

All taxes due as a result of the transportation, distribution, sale, franchise, or other disposition of gas by Seller, before the same passes the Point of Delivery hereunder, shall be and remain the obligations of Seller, and Buyer shall pay and be responsible for any and all taxes or charges after the point of delivery.

12. Warranty of Title

Seller expressly warrants title to and right to sell all gas delivered by it hereunder and warrants that said gas is being sold and delivered in accordance with all applicable state and federal laws, and the orders, directives, rules and regulations of any governmental body or official having jurisdiction.

13. Force Majeure

If any party is rendered unable, wholly or in part, by force majeure or other causes herein specified, to carry outfits obligations under this Contract, then upon such party's giving notice and full particulars of such force majeure in writing or by telegraph to the other party within a reasonable time after the occurrence of the cause, this Contract shall not terminate and the obligations of the party giving such notice, so far as they are affected by such force majeure or other causes herein specified, shall be suspended during and only during the continuance of such cause, and such cause shall be remedied so far as possible with all reasonable dispatch. The term "force majeure" as employed herein means acts of God; acts of governmental bodies regulating Buyer and/or Seller,

the failure of such governmental bodies to act and/or delays in actions by such governmental bodies; strikes, lockouts or other industrial disturbances; acts of the public enemy; wars; blockades; insurrections; riots; epidemics; landslides; lightning; earthquakes fires; storms; floods; washouts; arrests; and restraints of the government, either federal or state, civil or military; civil disturbances; explosions; breakage; breakdown or accident to machinery, equipment or lines of pipe; freezing of wells or lines of pipe; partial or entire failure of natural gas wells or gas supply; depletion of gas reserves; the partial or entire curtailment of flow by interstate or intrastate pipelines; the necessity or desirability of repairing, altering, maintaining, inspecting, replacing, changing the size of, substituting or removing machinery, equipment, pipelines or appurtenant facilities; and any other causes not reasonable within the control of the party claiming suspension, and through due diligence such party is unable, wholly or in part, to prevent or overcome. Such term likewise includes (i) those instances where either party is required to obtain servitude, right-of-way grants, permits, new delivery point(s) under existing tariffs or other means, exceptions or licenses to enable it to fulfill its obligations, and after exercising reasonable diligence and cost the party is unable to acquire or is delayed in acquiring the aforementioned requirements, and (ii) in those instances where either party is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is required to secure permits or permission from any governmental agency (federal, state or municipal, civil or military) to enable such party to fulfill its obligations, and after exercising reasonable diligence and cost, the party is unable to acquire or is delayed in acquiring said requirements. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty and the above requirement that any force majeure shall be remedied with all reasonable

dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposition when such course is inadvisable in the discretion of the party having the difficulty. The provisions of this clause shall not apply to the obligation to make payments of monetary amounts pursuant to the terms of Section 9 hereof.

14. Descriptive Headings

The descriptive headings contained herein are for convenience only and shall not control or affect the meaning of construction of any provision of this Agreement.

15. Assignment

Buyer shall not sell, assign or convey this Contract or any interest herein or any part thereof without the prior written consent of Seller which consent shall not be unreasonably withheld.

16. Waiver of Breach

The waiver by the parties of a breach by any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any of the parties hereto. Further, no course of dealing between the parties nor any delay in exercising any rights hereunder shall operate as a waiver of any rights of the parties hereto.

17. Governing Law

This Agreement shall be governed and construed in accordance with the laws of the State of Alabama.

18. Binding Effect

This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors, assigns and legal representatives.

19. Amendment

This Agreement may be amended from time to time or terminated by an instrument in writing signed by each of the parties to this Agreement.

20. Entire Agreement

This Agreement shall comprise the entire agreement between the parties hereto and hereby supersedes, replaces and revokes any and all understandings or agreement, whether written or oral, between the parties hereto. No variation or modification hereof shall be deemed valid unless contained in writing with like formality signed by each of the parties hereto, which writing shall make express reference to this Agreement.

21. Savings Clause

The parties intend this Agreement to be valid and enforced as written. However, if any provision, or any part thereof, is held to be invalid, illegal or unenforceable for any reason, the parties hereto agree that the court making such determination shall have the power to amend any provision in order to make such provision enforceable to the fullest extent permitted by law, and in its amended form, such provision shall then be enforceable and be enforced.

22. Additional Documents

The parties hereto hereby agree to execute any and all such further documents to effectuate the purposes and transaction contemplated herein.

23. Remedies

Each party hereto acknowledges that a remedy at law for any breach or attempted breach of this Agreement will be inadequate, agrees that each other party hereto shall be entitled to specific performance and injunctive and other equitable relief in case of any such beach or attempted breach, and further agrees to waive any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief.

24. Notices

All notices provided for by this Agreement shall be in writing. In the event a notice or other document is required to be sent hereunder, such notice or other document shall be deemed given if such notice or other document is either (i) delivered personally or (ii) sent by registered or certified mail to the party entitled to receive such notice or other document at the respective addresses for Buyer and Seller set forth below. Any party may change their address by filing notice of the change with the other party.

SELLER
Gas Utilities of Alabama, Inc.
510 Bering Drive, Suite 300
Houston, Texas 77057

BUYER
Tuscaloosa Steel Corporation

1700 Holt Road
Tuscaloosa, Alabama 35404

25. Definitions

The terms shown below as used in this Agreement shall have the following meaning:

(a) The term "*gas*" shall include casinghead gas, natural gas from gas wells, and residue gas resulting from processing casinghead gas and gas well gas.

(b) The term "*day*" shall mean the twenty-four (24) hour period commencing at 7:00 a.m. local time (hereinafter referred to as LT) on one calendar day and ending at 7:00 a.m. LT on the following calendar day.

(c) The term "*month*" shall mean the period beginning at 7:00 a.m. LT on the first day of a calendar month and ending at 7:00 a.m. LT on the first day of the next succeeding calendar month.

(d) The term "*Year*" shall mean any period of three hundred and sixty-five (365) consecutive days during the life of this Contract beginning at 7:00 a.m. LT on date of first delivery and any anniversary of such day during the term hereof.

(e) The term "*MMBtu*" shall be determined by multiplying the total MCF delivered, expressed in cubic feet at a temperature of sixty degrees Fahrenheit (60°F) and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute, times the gas heating value expressed in British Thermal Units per cubic foot of gas when adjusted to

a dry basis at a temperature of sixty degrees Fahrenheit (60°F) and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute.

(f) The term "*MMBtu*" shall mean one million (1,000,000) Btus.

(g) The term "*MCF*" shall mean one thousand (1,000) cubic feet.

(h) The terms "*British Thermal Unit*" and "*BTU*" shall mean one (1) BTU and is defined as the quantity of heat required to raise the temperature of one (1) avoirdupois pound of pure water from fifty-eight and five-tenths (58.5) degrees F to fifty-nine and five-tenths (59.5) degrees F at a constant pressure of fourteen and sixty-five hundredths (14.65) psia.

The terms and conditions of this Agreement are valid only if accepted by Buyer on or before the close of business on Friday, December 15, 1989.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed in several counterparts, each of which shall be deemed an original.

SELLER	BUYER
Gas Utilities of Alabama, Inc.	Tuscaloosa Steel Corporation
By: /s/ illegible	By: /s/ illegible
Witness: /s/ illegible	Witness: /s/ illegible
Date: 12-20-89	Date: 12-15-89

CONSULTING AGREEMENT

Tuscaloosa Steel Corporation (TSC)
Mr. David Tarawevich

Gas Utilities of Alabama, Inc. (GUA)
Mr. Dan C. Tutcher

Re: Proposed Contract for Construction of an Alternative Pipeline and Gas Sales Contract for Tuscaloosa Steel Corporation

Gentlemen:

Pursuant to the above referenced proposal (which will be submitted upon execution of this Agreement), TSC and GUA agree to the following:

> If TSC should for any reason whatsoever elect to continue transporting or purchasing gas from its current transporter/supplier under either a new or re-negotiated contract, it shall pay GUA a commission of twenty percent (20%) of any calculable savings resulting from its new or re-negotiated contract over its current gas sales/transportation price as of the date hereof. This commission shall be paid monthly for a period to coincide with a new or negotiated transport/sales agreement. TSC will also provide GUA with a copy of the new contract, along with copies of Alabama Gas Company invoices covering all gas/transportation fillings. GUA will provide TSC with an engineering and cost analysis for an alternative pipeline and gas supply as well as a proposal for same.